

REPUBLIC OF KENYA



**TWELFTH PARLIAMENT (FIFTH SESSION)**

**THE SENATE**

-----

**STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND  
HUMAN RIGHTS**

.....  
**REPORT ON THE LAW OF SUCCESSION (AMENDMENT) BILL  
(SENATE BILLS NO. 15 OF 2021)**  
.....

Clerk's Chambers,  
First Floor,  
Parliament Buildings,  
**NAIROBI.**

*Approved*  
*[Signature]*  
*14/10/2021*

*Rt. Hon. Speaker*  
*You may approve for*  
*tabling. [Signature]*  
*14/10/21*

*DC-EG*  
*Forwarded & recommended*  
*for tabling*  
*[Signature]*  
*14/10/2021*

October, 2021





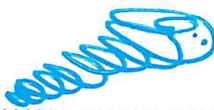
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## FOREWORD BY THE CHAIRPERSON

1. The Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021) seeks to amend the Law of Succession Act, to provide for gender equity in succession matters by ensuring that the widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry.
2. The Standing Committee on Justice, Legal Affairs and Human Rights considered the Bill at length. A call for submission of memoranda was placed in two newspapers with national circulation on Thursday, 13<sup>th</sup> May, 2021. The advertisement was also posted on the Parliament website and social media platforms. In response to the advertisement, the Committee received five written submissions from stakeholders, four of whom appeared before the Committee, which were considered by the Committee in making its recommendations on the Bill.
3. Based on its deliberations, the Committee has made various observations and recommendations on the Bill as set out in Chapter Three of this Report. Additionally, the Committee will present amendments with a view of strengthening the provisions of the Bill for consideration by this House.
4. The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in undertaking this important assignment. The Committee further wishes to thank the stakeholders who submitted written memoranda on the Bill.
5. It is now my pleasant duty, pursuant to standing order 143 (1), to present a Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021)

Signed.....

Date.....*5<sup>th</sup> October, 2021*.....

**SEN. ERICK OKONG'O MOGENI, SC, MP,  
CHAIRPERSON,  
STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN  
RIGHTS**

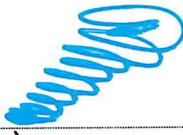



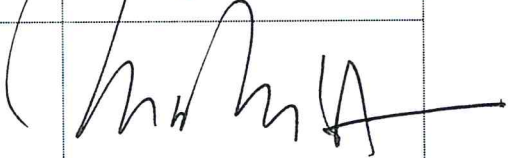




**ADOPTION OF THE REPORT ON THE LAW OF SUCCESSION  
(AMENDMENT) BILL (SENATE BILLS NO. 15 OF 2021)**

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**We, the undersigned Members of the Senate Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report –**

Sen. Erick Okong’o Mogeni, SC, MP	-Chairperson	
Sen. (Canon) Naomi Jillo Waqo, MP	-Vice-Chairperson	
Sen. Amos Wako, EGH, SC, FCI Arb, MP	-Member	
Sen. James Orengo, EGH, SC, MP	-Member	
Sen. Fatuma Dullo, CBS, MP	-Member	
Sen. Mutula Kilonzo Junior, CBS, MP	-Member	
Sen. Irungu Kang’ata, CBS, MP	-Member	
Sen. Johnson Sakaja, CBS, MP	-Member	

## PREFACE

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the standing 218 of and the Second Schedule to the Senate Standing Orders, and is mandated to: -

*'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'*

The Committee is comprised of –

- 1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
- 2) Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
- 3) Sen. Amos Wako, EGH, SC, FCI Arb, MP
- 4) Sen. James Orengo, EGH, SC, MP
- 5) Sen. Fatuma Dullo, CBS, MP
- 6) Sen. Mutula Kilonzo Junior, CBS, MP
- 7) Sen. Irungu Kang'ata, CBS, MP
- 8) Sen. Johnson Sakaja, CBS, MP

The Minutes of the Sittings of the Committee in considering the Law of Succession (Amendment) Bill (Senate Bill No. 15 of 2021) are attached to this Report collectively as *Annex 1*.

## CHAPTER ONE: INTRODUCTION

### A. Background on the Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021))

1. The Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021) is sponsored by Sen. Abshiro Halake MP. A copy of the Bill is attached to this Report as *Annex 2*.
2. The Bill was published on 12<sup>th</sup> March, 2021 and was read a First Time in the Senate on 11<sup>th</sup> May, 2021. Following the First Reading in the Senate, it stood committed, pursuant to Standing Order 140(1), to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.
3. Before publication of the Bill on 12<sup>th</sup> March, 2021, the Bill had initially been introduced in the Senate and read a First Time on 11<sup>th</sup> May, 2021. However, before the passage by the Senate, the High Court in Petition No. 284 of 2019 held that the concurrence process under Article 110(3) of the Constitution is mandatory and is a condition precedent before any House of Parliament can consider a Bill. The court further ordered the immediate cessation of consideration of all Bills that were pending before either House, and for which joint concurrence by the Speakers of both Houses could not be demonstrated, in order to allow such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110(3) of the Constitution.
4. As part of implementing the Court decision, it was determined that concurrence as required under the Constitution could not be demonstrated in respect of this Bill. The Bill was withdrawn and republished in compliance with the Court orders in Petition No. 284 of 2019.
5. The Standing Committee on Justice, Legal Affairs and Human Rights considered the Bill at length. A call for submission of memoranda was placed in the *Daily Nation* and *Standard* newspapers on Thursday, 13<sup>th</sup> May, 2021 (*Annex 3*). The advertisement was also posted on the Parliament website and social media platforms.
6. In response to the advertisement, the Committee received five written submissions from stakeholders, four of whom appeared before the Committee (*Annex 4*). The



Committee proceeded to consider the Bill and the submissions received thereon as set out in the matrix attached to this Report as *Annex 5*.

7. Based on its deliberations, the Committee has made various observations and recommendations as set out at Chapter Three of this Report. Additionally, the Committee has presented amendments with a view of strengthening the provisions of the Bill, for consideration by this House (*Annex 6*).

**B. Objective of the Bill**

8. The Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021) seeks to amend the Law of Succession Act, to provide for gender equity in succession matters by ensuring that a widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry, and that the father and mother of a deceased person inherit the deceased person on an equal footing.

**C. Overview of the Bill**

9. The Bill proposes the following—
  - i) Clause 2 of the Bill proposes to amend section 2 of the Act to provide for the definition of words which have been used in the Act but the same have not been defined. These words are intermeddling, marriage, matrimonial home, matrimonial property, residue estate, and spouse;
  - ii) Clause 3 of the Bill proposes to amend section 29 of the Act which provides for the definition of the word ‘dependant’. The Bill proposes to amend paragraph (a) to include a husband and remove ‘former wife or wives’ in the category of dependant. As a consequence of including a husband in paragraph (a), the Bill further proposes to delete paragraph (c) which provides that a husband is considered a dependant if he was being maintained by the deceased wife;
  - iii) Clause 4 of the Bill proposes to delete section 32 of the Act and substitute thereof a new subsection. Section 32 of the Act when read together with section 33 of the Act provides that the law applicable to agricultural land and crops on such lands, and livestock in the former Districts of West Pokot, Turkana, Marsabit, Mandera, Wajir, Garissa, Tana River, Narok, Samburu, Isiolo, Lamu and Kajiado in case of intestacy is the law or customs of the deceased’s community or tribe. The proposed amendment seeks to replace



districts with counties, and include community land as provided for under Article 63 of the Constitution as another exception in section 32;

- iv) Clause 5 of the Bill proposes to amend section 33 of the Act to provide that the law or customs to govern intestacy as regards property excluded in section 32 is the existing law or custom of the deceased's community or tribe;
- v) Clauses 6 and 7 of the Bill proposes to amend sections 35 and 36 of the Act to provide for termination of the life interest in the whole residue of the net intestate estate in the case of a widower who remarries. Currently, the Act only provides for termination of such life interest in the case of a widow who remarries;
- vi) Clause 8 of the Bill proposes to amend section 39 of the Act to provide for equality of parents in inheriting the net intestate estate where the deceased has left no surviving spouse or child. Currently, the deceased's mother inherits such property if the deceased's father is not alive; and
- vii) Clause 9 of the Bill proposes to insert a Tenth Schedule to the Act to set out the counties excluded under section 32 as opposed to setting them out in section 32.

#### **D. Consequences of the Bill**

- 10. The Bill will address gender inequalities in succession matters by ensuring that a widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry, and also enabling mothers to inherit their deceased children on an equal footing with fathers of such children.
- 11. Additionally, the Bill further will ensure that community land is excluded from the provisions of the Law of Succession Act.

## CHAPTER TWO: PUBLIC PARTICIPATION

### A. Invitation and consideration of stakeholder submissions on the Bill

12. The Standing Committee on Justice, Legal Affairs and Human Rights, pursuant to Article 118 of the Constitution and Standing Order 140, invited submissions from members of the public on the Bill via an advertisement placed in the Daily Nation and Standard newspapers on Thursday, 13<sup>th</sup> May, 2021 (*Annex 3*). The advertisement was also posted on the Parliament website and social media platforms.
13. In response to the advertisement, the Committee received five written submissions from stakeholders, four of whom appeared before the Committee (*Annex 4*).
14. The Committee proceeded to consider the Bill and the submissions received thereon as set out in the matrix attached to this Report as *Annex 5*.
15. In addition to the submission received pursuant to an advertisement made on 13<sup>th</sup> May, 2012, the Committee also considered submissions which were received before the Bill was republished. *Annex 7*

## CHAPTER THREE: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

### A. Committee Observations

16. The Bill inserts definition of the terms “marriage” and “spouse” as defined under the Marriage Act, No. 4 of 2014. The definition of the terms “marriage” and “spouse” will restrict meaning of husband and wife to persons in a union registered in accordance with the Marriage Act. This deviates from the meaning under the Law of Succession Act which has always had a wider scope.
17. Section 3(5) of the Law of Succession Act states that –

*Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.*
18. The Committee noted that the mischief behind the insertion of section 3(5) of the Law of Succession Act, which was done in 1981, was to ensure that every wife with whom the necessary polygamous marriage ceremonies or rituals had been conducted would be considered a wife irrespective of whether the husband had capacity to marry. Therefore, this provision protected the following persons —
  - (a) women who may have been married in a polygamous system and the husband subsequently marries another woman in a monogamous system; and
  - (b) women who may be married in a polygamous system by a man who was previously married in a monogamous system.
19. The Committee noted that sometimes the ‘wife’ married in a polygamous system is not aware that the ‘husband’ is married in a monogamous system and should therefore not be punished for the wrongs of the ‘husband’ when the ‘husband’ dies.
20. The Committee further noted that the wives married under monogamous system are most of the time able to prove the marriage because they would have marriage certificates. This discriminates against those married under polygamous systems who do not automatically get marriage certificates.
21. The Committee noted that the mischief that section 3(5) of the Law of Succession Act intended to address still persists and has yet to be addressed. Therefore, it was noted that the inclusion of the two definitions will negate the intention section 3(5) of the Law of Succession Act was intended to address, and that a conflict will arise.



22. The Bill proposes to insert the definition of the term “residue estate” to mean, the remainder of the net intestate estate after the matrimonial home, matrimonial property and personal effects have been distributed or otherwise transferred. However, the term “residue estate” has not been used anywhere in the Act and the Bill has not proposed its usage. Additionally, section 3(1) of the Law of succession Act has defined the term “net intestate estate” as follows –

*"net intestate estate" means the estate of a deceased person in respect of which he has died intestate after payment of the expenses, debts, liabilities and estate duty set out under the definition of "net estate", so far as the expenses, debts, liabilities and estate duty are chargeable against that estate.*

23. The “net intestate estate” comprises that part of the deceased’s property which is available for distribution amongst persons entitled to inherit a deceased person.
24. Further, the Bill proposes to insert definitions of the terms “matrimonial home” and “matrimonial property” as defined in the Matrimonial Property Act, No. 49 of 2013. Whereas the term “matrimonial home” has been used in the Law of Succession Act, the term “matrimonial property” has not been used in both the Law of Succession and the Bill.
25. Therefore, the proposed inclusion of the definition of the terms “residue estate” and “matrimonial property” will create an unnecessarily ambiguity and conflict with other provisions of the Law of Succession Act.
26. Section 3(2) and 3(3) of the Law of Succession Act provides as follows –

*(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.*

*(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to*



*other persons through her or him as though the child had been born to her or him in wedlock.*

27. On 7<sup>th</sup> February, 2019, Justice N Njagi, while determining *NSA & another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government & another [2019] eKLR*, among others, found that –

*Section 3(2) and 3(3) of the Law of Succession Act, are inconsistent with the Constitution in so far as a ‘child’ born out of wedlock is regarded as such if the father.... has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility’. As stated before, a parent’s responsibility to their child is mandatory and not discretionary. This section is in contravention of Article 53 (1)(e) which requires parents to provide for their children whether they are married or not.*

28. Consequently, sections 3(2) and 3(3) of the Law of Succession Act were declared to be inconsistent with Article 53(1)(e) of the Constitution and thereby null and void. The Attorney-General was directed to, within 90 days from the date of the decision, amend the impugned sections to align them with the Constitution.
29. The Committee observed that sections 3(2) and 3(3) of the Law of Succession Act are yet to be amended and be aligned to the Constitution.
30. Clause 4 of the Bill seeks to amend section 32 of the Law of Succession Act to, among others, exclude the application of the provisions of Part V of the Law of Succession Act with respect to community land as provided for in Article 63 of the Constitution.
31. The Committee observed that community land is comprehensively provided for under Article 63 of the Constitution and the Community Land Act, No. 27 of 2016, and that such property vests in a community. Therefore, the proposed exclusion of community land from the application of the provisions of Part V of the Law of Succession Act does not add value since at no time will community land form part of an individual’s free property.

32. Delete section 32 and 33 of the Law of Succession Act so that the law applies uniformly throughout the country.
33. Amend section 35 of the Law of Succession Act to protect the interest of children who may not be children of the surviving wife .

**B. Committee Recommendation**

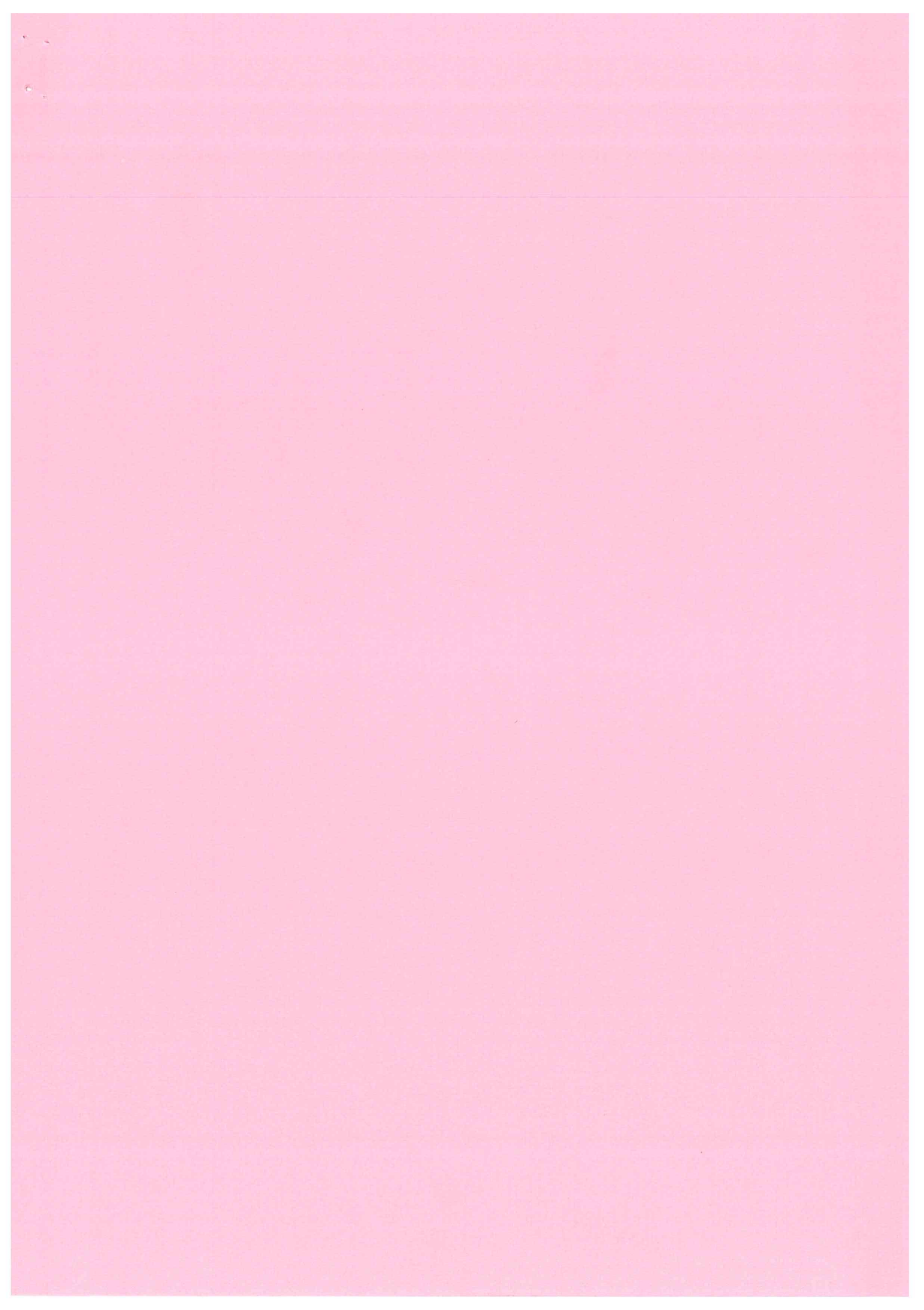
34. Arising from the above observations, the Committee makes the following recommendations –
  - (a) That the proposed new definition of the terms “marriage”, “matrimonial property”, “residue estate”, and “spouse” be deleted;
  - (b) That section 32 and 33 be deleted; and
  - (c) That sections 3(2) and 3(3) of the Law of Succession Act be amend so as to align the same with the Constitution.
35. The text of the proposed amendment is set out at *Annex 6* of this Report.

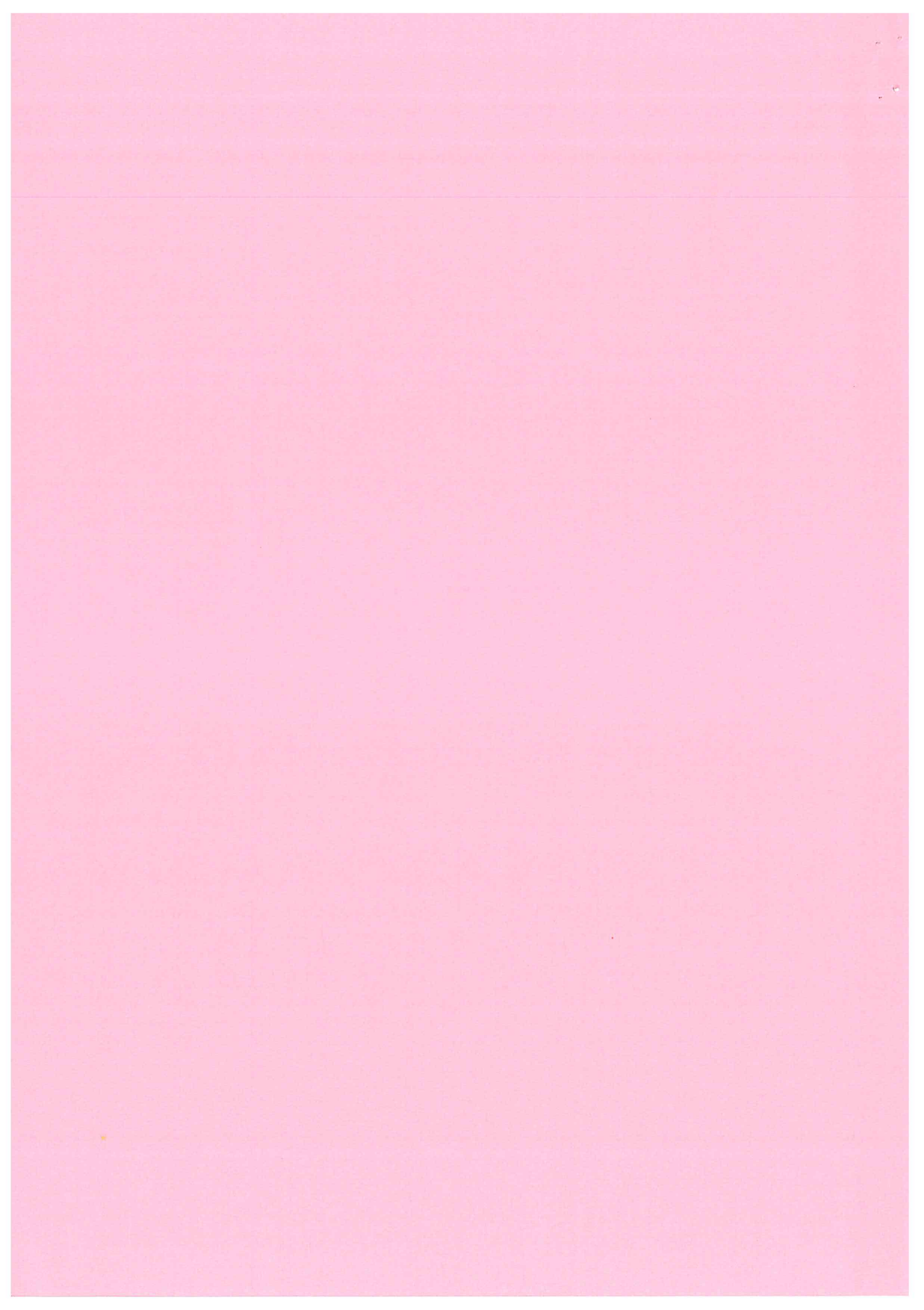
## ANNEXES

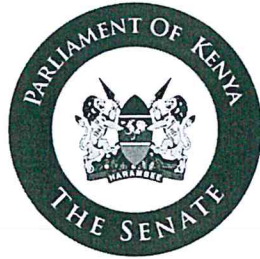
- Annex 1:** Minutes of the Committee in considering the Bill.
- Annex 2:** The Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021)
- Annex 3:** Advertisement for submission of memoranda placed in the *Nation* and *Standard* newspapers on Thursday, 13<sup>th</sup> May, 2021.
- Annex 4:** Copy of the submissions received from five stakeholders.
- Annex 5:** Matrix on consideration of public submissions on the Bill.
- Annex 6:** Committee stage amendments to the Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021).
- Annex 7:** Matrix of submissions received on the Law of Succession (Amendment) Bill (Senate Bills No. 1 of 2020).











**TWELFTH PARLIAMENT | FIFTH SESSION**

**MINUTES OF THE SEVENTIETH SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD IN WINDSOR HOTEL IN KIAMBU COUNTY, ON SATURDAY, 4<sup>TH</sup> SEPTEMBER, 2021 AT 10.00 A.M.**

**PRESENT**

- |  |                                   |
|--|-----------------------------------|
| 1. Sen. Erick Okong'o Mogeni, SC, MP         | - Chairperson ( <b>Chairing</b> ) |
| 2. Sen. (Canon) Naomi Jillo Waqo, MP         | - Vice Chairperson                |
| 3. Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP | - Member                          |
| 4. Sen. Fatuma Dullo, CBS, MP                | - Member                          |
| 5. Sen. (Dr.) Irungu Kang'ata, CBS, MP       | - Member                          |

**ABSENT WITH APOLOGY**

- |  |          |
|--|----------|
| 1. Sen. James Orengo, EGH, SC, MP      | - Member |
| 2. Sen. Mutula Kilonzo Junior, CBS, MP | - Member |
| 3. Sen. Johnson Sakaja, CBS, MP        | - Member |

**SECRETARIAT**

- |                         |   |
|-------------------------|---|
| 1. Mr. Charles Munyua   | - Clerk Assistant                           |
| 2. Mr. Moses Kenyanchui | - Legal Counsel                             |
| 3. Ms. Purity Orutwa    | - Clerk Assistant ( <i>Taking Minutes</i> ) |
| 4. Ms. Lucianne Limo    | - Media Relations Officer                   |
| 5. Mr. James Ngusya     | - Sergeant-at-Arms                          |
| 6. Mr. James Kimiti     | - Hansard Officer                           |

**MIN. NO. 381/2021**

**PRAYER**

The sitting commenced with a word of prayer by Sen. (Canon) Naomi Jillo Waqo, MP.

**MIN. NO. 382/2021**

**ADOPTION OF THE AGENDA**

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Fatuma Dullo, CBS, MP and seconded by Sen. Amos Wako, EGH, SC, FCI Arb, MP.

**MIN. NO. 383/2021      THE COUNTY BOUNDARIES BILL (SENATE BILLS NO. 20 OF 2021)**

The Committee was taken through and considered the draft Committee Report and amendments to the County Boundaries Bill (Senate Bills No. 20 of 2021).

Thereupon, the Committee adopted the Report on the Bill, having been proposed by Sen. Fatuma Dullo, CBS, MP and seconded by Sen. (Dr.) Irungu Kang'ata, CBS, MP.

**MIN. NO. 384/2021      THE LAW OF SUCCESSION (AMENDMENT) BILL (SENATE BILLS NO. 15 OF 2021)**

The Committee was taken through and considered the draft Committee Report and amendments to the Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021).

Thereupon, the Committee adopted the Report on the Bill, having been proposed by Sen. Amos Wako, EGH, EBS, SC, FCI Arb, MP and seconded by Sen. (Canon) Naomi Jillo Waqo, MP.

**MIN. NO. 385/2021      ADJOURNMENT**

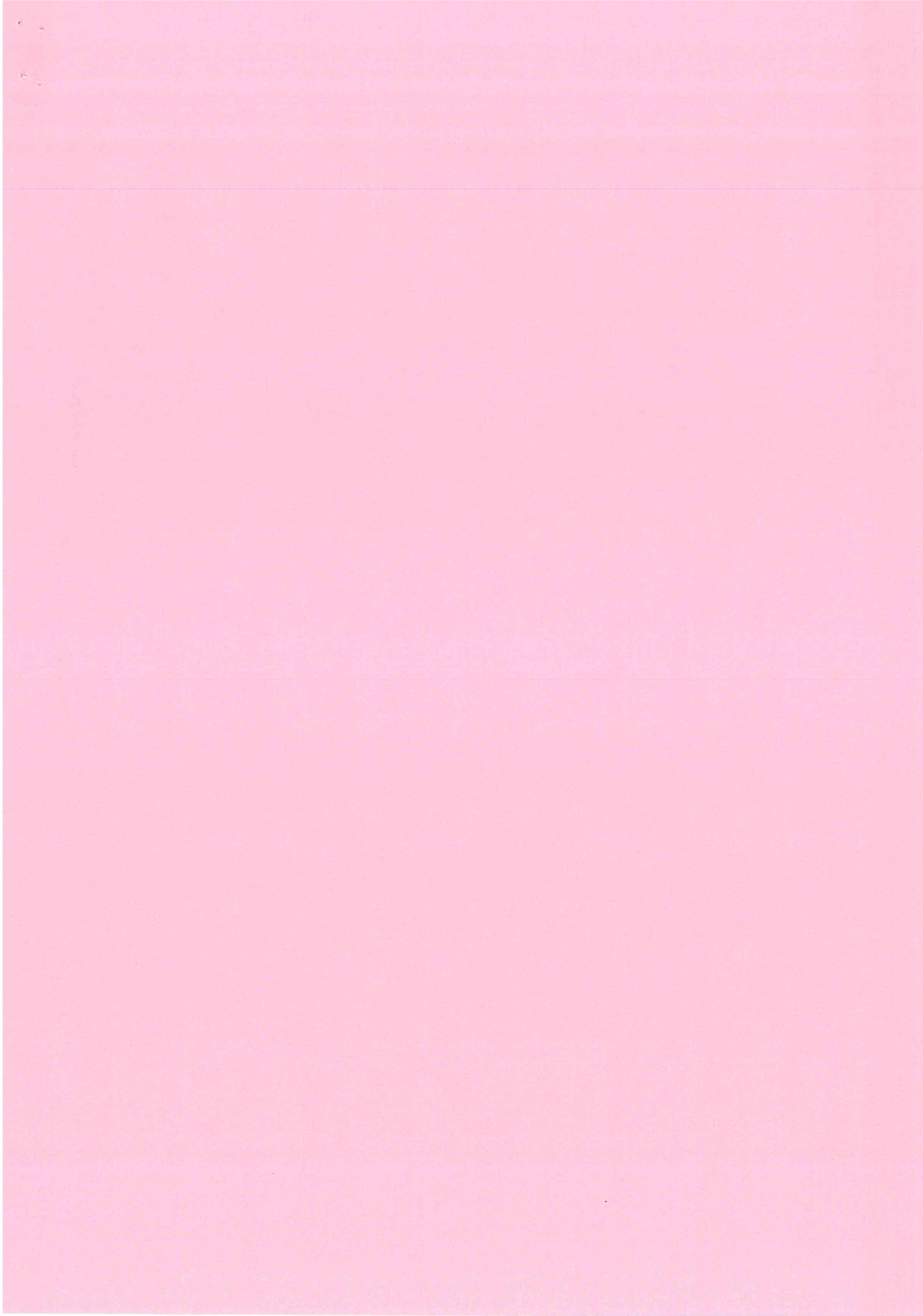
There being no other business, the meeting was adjourned at 12.00 pm. The next meeting would be on Tuesday, 7<sup>th</sup> September, 2021 at 8.00 am.

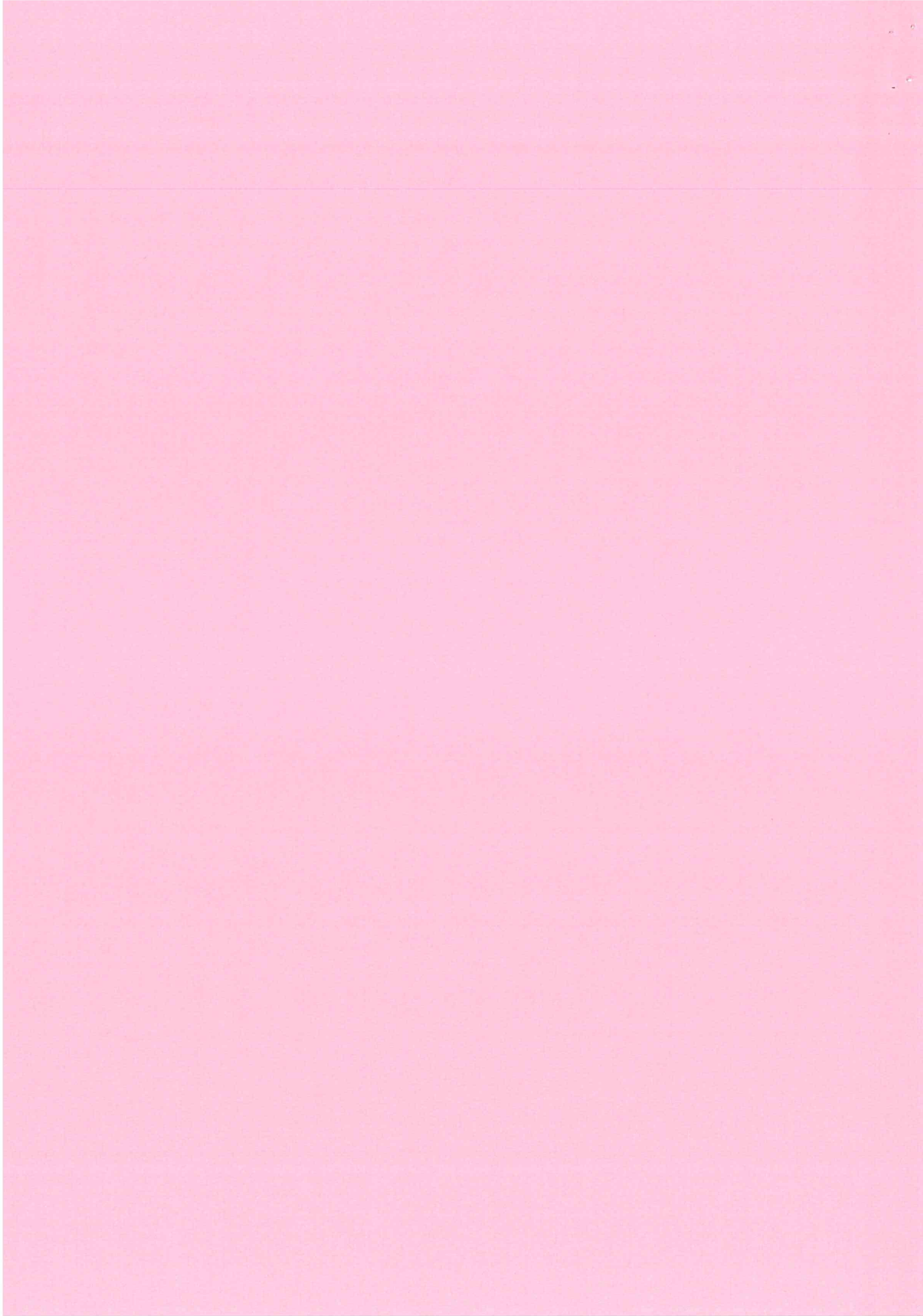


**SIGNED:** .....  
**(CHAIRPERSON)**

**DATE:** ..... 5<sup>th</sup> October, 2021 .....









**SPECIAL ISSUE**

*Kenya Gazette Supplement No. 35 (Senate Bills No. 15)*

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REPUBLIC OF KENYA

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***KENYA GAZETTE SUPPLEMENT***

**SENATE BILLS, 2021**

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**NAIROBI, 12th March, 2021**

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**THE LAW OF SUCCESSION (AMENDMENT) BILL,  
2021**

**A Bill for**

**AN ACT of Parliament to amend the Law of Succession Act; and for connected purposes.**

**ENACTED** by the Parliament of Kenya, as follows—

1. This Act may be cited as the Law of Succession (Amendment) Act, 2021.

Short title.

2. Section 3 of the Law of Succession Act, hereinafter referred to as the “principal Act”, is amended in subsection (1) by inserting the following new definitions in their proper alphabetical order-

Amendment of section 3 of Cap 160.

“intermeddling” means —

- (a) taking possession of, disposing off or using the property of the deceased without the authority under this Act or any other applicable law;
- (b) ejecting by force or by coercion a surviving spouse or child from the matrimonial home; or
- (c) any unlawful dealing with the deceased person’s estate.

“marriage” shall have the same meaning assigned to it under the Marriage Act;

No. 4 of 2014.

“matrimonial home” shall have the same meaning assigned to it under the Matrimonial Property Act;

No. 49 of 2013.

“matrimonial property” shall have the same meaning assigned to it under the Matrimonial Property Act;

“residue estate” means the remainder of the net intestate estate after the matrimonial home, matrimonial property and personal effects have been distributed or otherwise transferred;

“spouse” shall have the same meaning assigned to it under the Marriage Act;

3. Section 29 of the principal Act is amended by — Amendment of section 29 of Cap 160.
- (a) deleting paragraph (a) and substituting therefor the following new paragraph —
- (a) spouse or spouses and the children of the deceased whether or not maintained by the deceased prior to the deceased's death;
- (b) deleting paragraph (c).
4. The principal Act is amended by deleting section 32 and substituting therefor the following new section — Deletion of section 32 of Cap 160
32. The provisions of this Part shall not apply to —
- (a) land contemplated under Article 63 of the Constitution; and
- (b) agricultural land, crops and livestock in counties specified under the Tenth Schedule.
5. Section 33 of the principal Act is amended by inserting the word “existing” immediately after the words “section 32 shall be the”. Amendment of section 33 of Cap 160.
6. Section 35 of the principal Act, is amended — Amendment of section 35 of Cap 160.
- (a) in subsection (1) by —
- (i) inserting the words “subject to subsection (1A) at the beginning of paragraph (b); and
- (ii) deleting the proviso; and
- (b) by inserting the following new subsection immediately after subsection (1) —
- (1A) The interest of the surviving spouse under subsection (1)(b) shall determine upon re-marriage.
7. Section 36 of the principal Act is amended — Amendment of section 36 of Cap 160.
- (a) in subsection (1) by —
- (i) inserting the words “subject to subsection (1A) at the beginning of paragraph (c); and
- (ii) deleting the proviso; and
- (b) by inserting the following new subsection immediately after subsection (1) —

(1A) The interest of a surviving spouse under subsection (1)(c) shall determine upon re-marriage.

8. Section 39 of the principal Act is amended in subsection (1) —

Amendment of section 39 of Cap 160.

(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

(a) parents in equal share; or if dead

(b) by deleting paragraph (b) and substituting therefor the following new paragraph—

(b) surviving parent; or if none

9. The principal Act be amended by inserting the following Schedule immediately after the Ninth Schedule-

Insertion of Tenth Schedule in Cap 160

**TENTH SCHEDULE**

**(s. 32)**

1. Tana River
2. Lamu
3. Garissa
4. Wajir
5. Mandera
6. Marsabit
7. Isiolo
8. Turkana
9. West Pokot
10. Samburu
11. Narok
12. Kajiado.

## **MEMORANDUM OF OBJECTS AND REASONS**

### **Statement of the Objects and Reasons for the Bill**

The principal object of this Bill is to amend the Law of Succession Act to provide for gender equity in succession matters. The Bill in amending the Law of Succession Act seeks to ensure that the Act provides for gender equity with regards to succession matters. The Bill thus ensures that the widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry.

The Bill further seeks to exclude community land from the ambit of succession.

### **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

The Bill does not delegate legislative powers nor does it limit the fundamental rights and freedoms.

### **Statement on how the Bill concerns county governments**

The Bill deals with succession matters which essentially touch on land and other movable and immovable property of a deceased person. Succession matters have implications on the well-being of members of the society especially dependants of the deceased person.

The stability and continuity of life of the dependants of a deceased person contribute greatly to the economy and security of a county.

The Bill is therefore a Bill concerning county government in terms of Article 110 (1) (a) of the Constitution.

### **Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution**

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated 17th February, 2021.

ABSHIRO HALAKE,  
*Senator.*



*Section 29 of Cap 160 of which it is proposed to amend—*

**29. Meaning of dependant**

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

*Section 32 of Cap 160 of which it is proposed to amend—*

**32. Excluded property**

The provisions of this Part shall not apply to—

(a) agricultural land and crops thereon; or

(b) livestock, in various Districts set out in the Schedule: West Pokot, Wajir, Samburu, Lamu, Turkana, Garissa, Isiolo, Kajiado, Marsabit, Tana River, Mandera, Narok.

*Section 33 of Cap 160 of which it is proposed to amend—*

**33. Law applicable to excluded property**

The law applicable to the distribution on intestacy of the categories of property specified in section 32 shall be the law or custom applicable to the deceased's community or tribe, as the case may be.

*Section 35 of Cap 160 of which it is proposed to amend—*

**Where intestate has left one surviving spouse with no children**

**35.** (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—

(a) the personal and household effects of the deceased absolutely;  
and

(b) a life interest in the whole residue of the net intestate estate:

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.

(4) Where an application is made under subsection (3), the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so, what order, shall have regard to—

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
- (c) the existing and future means and needs of the applicant and the surviving spouse;
- (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
- (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
- (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
- (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

*Section 36 of Cap 160 of which it is proposed to amend—*

**Where intestate has left one surviving spouse but no child or children**

**36.** (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to—

- (a) the personal and household effects of the deceased absolutely; and
- (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
- (c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

(2) The Minister may, by order in the Gazette, vary the amount specified in paragraph (b) of subsection (1).

(3) Upon the determination of a life interest created under subsection (1), the property subject to that interest shall devolve in the order of priority set out in section 39.

*Section 39 of Cap 160 of which it is proposed to amend—*

**Where intestate has left no surviving spouse or children**

**39.** (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

- (a) father; or if dead
- (b) mother; or if dead
- (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
- (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
- (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.





1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in the context of public administration and financial management.

2. The second part of the document outlines the various methods and tools used to collect, store, and analyze data. It highlights the need for robust systems that can handle large volumes of information while ensuring data integrity and security.

3. The third part of the document focuses on the role of technology in modern record-keeping. It discusses how digital solutions, such as cloud storage and data analytics, can significantly improve efficiency and reduce the risk of data loss or corruption.

4. The fourth part of the document addresses the challenges faced by organizations in implementing effective record-keeping practices. It identifies common obstacles, such as budget constraints, lack of training, and resistance to change, and offers practical strategies to overcome these challenges.

5. The fifth part of the document provides a comprehensive overview of the legal and regulatory requirements governing record-keeping. It details the specific rules and standards that organizations must adhere to, ensuring compliance and avoiding potential legal consequences.

6. The sixth part of the document explores the future of record-keeping, including emerging trends such as artificial intelligence, blockchain, and data lakes. It discusses how these technologies will shape the way organizations manage their records and the implications for data privacy and security.

7. The seventh part of the document offers a series of recommendations and best practices for organizations looking to optimize their record-keeping processes. It covers topics such as data governance, access control, and regular audits to ensure the accuracy and reliability of the records.

8. The eighth part of the document provides a detailed case study of a successful record-keeping implementation. It describes the specific challenges the organization faced, the solutions implemented, and the resulting benefits, such as improved operational efficiency and enhanced data-driven decision-making.

9. The ninth part of the document discusses the importance of ongoing training and education for staff involved in record-keeping. It emphasizes that continuous learning is essential to keep up with the rapidly evolving landscape of data management and technology.

10. The tenth part of the document concludes with a summary of the key findings and a call to action for organizations to prioritize record-keeping as a critical component of their overall data strategy.

11. The eleventh part of the document provides a detailed overview of the various types of records that organizations typically maintain. It includes a list of common record categories, such as financial records, personnel files, legal documents, and operational logs, and explains the specific requirements for each type.

12. The twelfth part of the document discusses the importance of data backup and recovery strategies. It outlines the different backup methods available, such as full backups, incremental backups, and differential backups, and provides guidance on how to design a robust recovery plan to minimize downtime in the event of a data loss.

13. The thirteenth part of the document focuses on the role of metadata in record-keeping. It explains how metadata, such as file names, dates, and tags, can be used to organize and search records more effectively, and provides tips for creating meaningful and consistent metadata.

14. The fourteenth part of the document addresses the issue of data retention and archiving. It discusses the factors that influence retention periods, such as legal requirements and business needs, and offers strategies for managing the lifecycle of records, from creation to disposal.

15. The fifteenth part of the document provides a detailed guide to the various software and hardware options available for record-keeping. It compares different solutions based on factors such as cost, scalability, and integration capabilities, and helps organizations choose the right tools for their specific needs.

16. The sixteenth part of the document discusses the importance of data security and access control. It outlines the different security measures that can be implemented, such as encryption, firewalls, and intrusion detection systems, and provides guidance on how to design a secure and controlled access environment.

17. The seventeenth part of the document focuses on the role of data governance in record-keeping. It explains how data governance frameworks can help organizations establish clear policies and procedures for data management, ensuring consistency and accountability across the organization.

18. The eighteenth part of the document provides a detailed overview of the various standards and best practices for record-keeping. It includes a list of relevant standards, such as ISO 15489 and NIST SP 800-64, and explains how organizations can use these standards as a guide for their record-keeping practices.

19. The nineteenth part of the document discusses the importance of data quality and accuracy. It outlines the different methods for ensuring data quality, such as data validation, data cleansing, and data auditing, and provides guidance on how to monitor and improve data quality over time.

20. The twentieth part of the document provides a detailed overview of the various tools and techniques used for data analysis and reporting. It includes a list of common data analysis tools, such as spreadsheets, data visualization software, and business intelligence platforms, and explains how these tools can be used to extract insights from record-keeping data.

21. The twenty-first part of the document discusses the importance of data privacy and protection. It outlines the different privacy laws and regulations, such as the GDPR and the CCPA, and provides guidance on how organizations can ensure that their record-keeping practices comply with these laws and protect the privacy of their data subjects.

22. The twenty-second part of the document provides a detailed overview of the various methods for data migration and integration. It explains how data can be moved from one system to another and how different systems can be integrated to share data, and provides guidance on how to plan and execute these processes.

23. The twenty-third part of the document focuses on the role of data in decision-making and business performance. It explains how data can be used to identify trends, track performance, and make informed decisions, and provides guidance on how to design a data-driven decision-making process.

24. The twenty-fourth part of the document discusses the importance of data ethics and responsible data management. It outlines the different ethical considerations, such as transparency, accountability, and fairness, and provides guidance on how organizations can ensure that their data management practices are ethical and responsible.

25. The twenty-fifth part of the document provides a detailed overview of the various challenges and opportunities in the field of record-keeping. It includes a list of common challenges, such as data silos and data fragmentation, and discusses the opportunities for innovation and improvement in the field.

26. The twenty-sixth part of the document provides a detailed overview of the various trends and developments in the field of record-keeping. It includes a list of emerging trends, such as data lakes and data mesh, and discusses the implications of these trends for the future of record-keeping.

27. The twenty-seventh part of the document provides a detailed overview of the various resources and tools available for record-keeping. It includes a list of books, articles, and online resources, and provides guidance on how to use these resources to stay up-to-date on the latest developments in the field.

28. The twenty-eighth part of the document provides a detailed overview of the various organizations and associations in the field of record-keeping. It includes a list of common organizations, such as the International Association of Records Management and Archives, and provides guidance on how to join these organizations and benefit from their resources.

29. The twenty-ninth part of the document provides a detailed overview of the various careers and job opportunities in the field of record-keeping. It includes a list of common job titles, such as records manager and data analyst, and provides guidance on how to develop the skills and qualifications needed for these careers.

30. The thirtieth part of the document provides a detailed overview of the various ways to get involved in the field of record-keeping. It includes a list of common ways to get involved, such as attending conferences and participating in research projects, and provides guidance on how to find these opportunities.





**TWELFTH PARLIAMENT | FIFTH SESSION  
THE SENATE**

**INVITATION FOR PUBLIC PARTICIPATION AND  
SUBMISSION OF MEMORANDA**

At the sitting of the Senate held on Tuesday, 11<sup>th</sup> May, 2021, the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 140 (5) of the Senate Standing Orders, the Committees now invite interested members of the public to submit any representations that they may have on the Bills by way of written Memoranda.

The Memoranda may be sent **by email** on the address: [csenate@parliament.go.ke](mailto:csenate@parliament.go.ke) and copied to the respective Committee email addresses indicated at the fourth column below, to be received on or before **Friday, 28<sup>th</sup> May, 2021 at 5.00pm.**

Bill	Committee Referred To	Email Address
1. The Coffee Bill (Senate Bills No. 22 of 2020)	Standing Committee on Agriculture, Livestock and Fisheries	<a href="mailto:senatescaif@parliament.go.ke">senatescaif@parliament.go.ke</a>
2. The Natural Resources (Benefit Sharing) Bill (Senate Bills No. 25 of 2020)	Standing Committee on Land, Environment and Natural Resources	<a href="mailto:senlandenviron@gmail.com">senlandenviron@gmail.com</a>
3. The Health (Amendment) Bill (Senate Bills No. 26 of 2020)	Standing Committee on Health	<a href="mailto:senatekehealth@gmail.com">senatekehealth@gmail.com</a>
4. The Basic Education (Amendment) Bill (Senate Bills No. 4 of 2021)	Standing Committee on Education	<a href="mailto:senateeducom@gmail.com">senateeducom@gmail.com</a>
5. The Kenyan Sign Language Bill (Senate Bills No. 5 of 2011)	Standing Committee on Education	<a href="mailto:senateeducom@gmail.com">senateeducom@gmail.com</a>
6. The County Vocational Education and Training Bill (Senate Bills No. 6 of 2021)	Standing Committee on Education	<a href="mailto:senateeducom@gmail.com">senateeducom@gmail.com</a>
7. The Street Vendors (Protection of Livelihood) Bill (Senate Bills No. 7 of 2021)	Standing Committee on Tourism, Trade and Industrialization	<a href="mailto:senatetourismandtrade@gmail.com">senatetourismandtrade@gmail.com</a>
8. The County Hall of Fame Bill (Senate Bills No. 9 of 2021)	Standing Committee on Labour and Social Welfare	<a href="mailto:senatecommittee.labour@parliament.go.ke">senatecommittee.labour@parliament.go.ke</a>
9. The Office of The County Printer Bill (Senate Bills No. 13 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senateilahrc@gmail.com">senateilahrc@gmail.com</a>
10. The Disaster Risk Management Bill (Senate Bills No. 14 of 2021)	Standing Committee on National Security, Defence and Foreign Relations	<a href="mailto:snsdfr@gmail.com">snsdfr@gmail.com</a>
11. The Law of Succession (Amendment) Bill (Senate Bills No. 15 of 2021)	Standing Committee on Justice, Legal Affairs and Human Rights	<a href="mailto:senateilahrc@gmail.com">senateilahrc@gmail.com</a>
12. The Prompt Payment Bill (Senate Bills No. 16 of 2021)	Standing Committee on Finance and Budget	<a href="mailto:scfinanceandbudget@gmail.com">scfinanceandbudget@gmail.com</a>

The Bills may be accessed on the Parliament website at <http://www.parliament.go.ke/the-senate/senate-bills>.

**J.M. NYEGENYE, CBS,  
CLERK OF THE SENATE.**











## POLICY BRIEF

### THE LAW OF SUCCESSION ACT AND INHERITANCE RIGHTS REFORMS IN KENYA

#### 1.0. INTRODUCTION

The right to own, access and control of land and property is essential to women's equality and wellbeing. The link between secure land and property rights and improved livelihood including management of impact of HIV/AIDs is well documented<sup>1</sup>. Despite these women in Kenya, continue to face barriers to their access, use of, and control over land and property.

In the pre-colonial era land and property was communally owned the use and access was governed was governed by applicable customary laws<sup>2</sup>. This form of land tenure protected women's right to use and access land property<sup>3</sup>. The colonial period saw the introduction of foreign land tenure system and laws. Individualization and absolute proprietorship of land began and women started losing out on land and property rights including those that were customarily protected<sup>4</sup>. The new land, marriage and succession regime adversely affected women's land and property rights and the same continued after independence<sup>5</sup>.

The Constitution of Kenya 2010, the Land Act 2012, Land Registration Act 2012, National Land Commission Act 2012, and Matrimonial Property Act 2013 allow women to acquire land through purchase, gift, inheritance and allocation of public land by government.

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<sup>1</sup> Netherlands Ministry of Foreign Affairs (2011) *Women's Economic Empowerment to Foster Food Security; Case Studies from Developing Countries*

<sup>2</sup> William .M Musyoka *Law of Succession* 2006 Law Africa

<sup>3</sup> Patricia Kamere- Mbote *The Law of Succession in Kenya: Gender Perspective in Property Management and Control* 1995 IELRC

<sup>4</sup> Perpetua Wambui Karanja *Women's Land Ownership Rights in Kenya* 1991

<sup>5</sup> *Ibid*

Whereas these laws were enacted to ensure women acquisition of land through purchase, gift and allocation of public land is seamless and processes conform to the Constitutional provisions including equality and non-discrimination; women continue to face hurdles in inheritance of land and property. This is ironical since inheritance is a more assured way of women acquiring land and property.

The Law of Succession Act CAP 160 is the parent legislation enacted in 1981 to regulate succession and inheritance laws in the country. The Act contains certain progressive provisions but the implementation often influenced by patriarchy. In addition, contrary to the Constitution of Kenya, the Act also has discriminatory provisions against women thereby denying them their inheritance rights. It is necessary therefore for the Law of Succession to be amended to conform to the current constitutional and legislative regime.

## **2.0.WOMEN'S LAND AND PROPERTY RIGHTS AND LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

The Law of Succession Act was enacted after the recommendations of the 1968, the Commission on Law of Succession. The Act was created to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons. The Act has various provisions that seek to protect and promote the rights of women they include;<sup>6</sup>

- a) Women are permitted to make wills and challenge one if not adequately provide for.
- b) A wife ranks high among the dependants of the deceased husband and a surviving spouse is considered as the most suitable person to take charge of her deceased husband property; and
- c) Children are allowed to inherit without making any preference to a male child and a female child<sup>7</sup>

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<sup>6</sup> Section 5, 26, 29, 35, 36, 37, 38, 39, 40 and 41 of the Act

<sup>7</sup> International Women's Human Rights Clinic Georgetown University Law Center & The Federation of Women Lawyers: Kenya —*Empowering Women With Rights to Inheritance —A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation* || 2009



However, despite the progressive provisions, the Act contains discriminatory provisions and lack key provisions that would offer better protection for women's land, property and inheritance rights.

The following are shortcomings of the Act.

a) Application of customary law<sup>8</sup>

The Act allows the application of customary law to persons who died prior to the commencement of the law in 1981. The customary laws for most communities in Kenya are patriarchal therefore deny women the right to inherit land and property.

On the application of customary laws, the courts have made varied pronouncement, until in later years, the court denied wives and daughters from inheriting land and property. In a progressive judgment, the judge in *Re Estate of Pricilla Wairimu Kamau (2005) eKLR* ruled that whereas the customary laws would be applicable in distributing an estate of a deceased who died prior to the enactment of the Act; the deceased customary laws that discriminated against women (on inheritance) could not be applicable since they are repugnant to justice. However, the judge in *Re Estate of Mutio Ikonyo (deceased) & Peter Mutua Ngui & 2 Others (2006) eKLR* ruled that customary laws of the deceased persons will apply in the distribution of the deceased estate thereby disinheriting female family members of the deceased.

This provision is detrimental to women whose family members died prior to 1981, the varied pronouncement by the court is indicative would be at high risk of losing their inheritance rights. The provision is contrary to the Constitutional provisions on supremacy of Constitution and on equality and non-discrimination<sup>9</sup>.

b) Exclusion of Muslims in application of the Act<sup>10</sup>

The Act does not apply in succession matters involving a deceased person who professed the Muslim faith. The mandatory provision does not allow the deceased beneficiaries to choose a succession regime. For example, if property is distributed under Islamic law, one cannot use the Law of Succession to contest the distribution.

The Constitution allows the application of Islamic Law in personal matters but does not compel anyone to apply the same. This was clarified by the court in the case of *R.B &*

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<sup>8</sup> Section 2 (1)

<sup>9</sup> Article 2 and 27

<sup>10</sup> Section 2 (2) and (3)

*R.G.O v H.S.B & A.S.B [2014] eKLR* where the court held that to compel all Muslims to subject themselves to the jurisdiction of the Kadhi's Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights.

It is necessary therefore to allow persons who profess Muslim faith to choose what regime will be applicable.

c) Discrimination against child or children born out of wedlock<sup>11</sup>

The Act renders the ability of a child born out of wedlock to have a legal relationship with their father only subject to the father's recognition and acceptance. A child born out of wedlock is also precluded from enjoying relationships to other persons through their fathers if the father has not recognized him/her.

This is contrary to Article 53 1 (e) that prohibits discrimination of a child born in or out of wedlock.

d) Security in marriage<sup>12</sup>

The Act does not offer women in monogamous marriage security as the Act recognizes any other subsequent marriage under customs. The section permits a man in a monogamous type of marriage to marry subsequent wife/wives under customary law. The courts have given different interpretation Section 3 (5) for example in *Re Estate of Reuben Nzioka Mutua (deceased)* the court ruled that the section was brought in to cater for women married under customary law who were either neglected or abandoned by their husbands during his lifetime and if it is interpreted any other way it would render useless any marriage under statute. This interpretation was reversed by the Court of Appeal in *Irene Njeri Macharia v. Margaret Wairimu Njomo and another Nairobi Court of Appeal Number 139 of 1994 (1996) eKLR* where the court ruled that notwithstanding the provisions of Section 37 of the Marriage Act (repealed), a woman married under a system which recognizes polygamy is a wife purposes on succession only.

The provision cannot stand with the current Constitution on equality in marriage and the Marriage Act 2014 that recognizes Customary, Civil, Islamic, Hindu and Christian marriages. Islamic and Customary marriages presumed polygamous or potentially

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<sup>11</sup> Section 3 (2) and (3)

<sup>12</sup> Section 3 (5)



polygamous<sup>13</sup>. The provision should therefore confirm to the Constitution and the Marriage Act.

e) Discrimination based on social origin <sup>14</sup>

The Act exempts the application of intestacy certain areas of Kenya<sup>15</sup>. The areas listed are mainly the pastoral communities where land continues to be held communally. The Act allows the application of customary laws of the deceased. These customary laws have been influence by patriarchy and therefore not protective of women's land and inheritance rights.

In addition, the enactment of the Community Land Act No. 27 of 2016 makes it easier for women to enjoy land and property rights in a communal set up. The Act not only recognizes inheritance<sup>16</sup> in community land, but also gives equal rights and benefits to all community members including women. The Act should make provision of how property in a communal set up should be distributed upon death within the Constitutional standards of equality and non-discrimination.

f) Discrimination based on gender <sup>17</sup>

The Act relinquishes widows' inheritance rights upon subsequent remarriage. This means that a widow will lose her right to live in the marital home if she chooses to remarry, but a widower will be allowed to remain in the marital home if he decides to remarry<sup>18</sup>. In addition, a under Section 39 (1) a), a father is granted priority to inherit a deceased person's estate and a mother is only allowed to inherit under Section 39 (1) b) if the father is deceased.

The two provisions violate women's right to equality and non-discrimination under Article 27 the Constitution and should be amended.

g) The Act fails to effectively protect women from harmful practices

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<sup>13</sup> Section 6

<sup>14</sup> Section 32, 33

<sup>15</sup> These areas are; West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok

<sup>16</sup> The provision discriminates against widows who choose to remarry.

<sup>17</sup> Section 35 (1) b) , 36 (1) c), 39 (1) a), b)

<sup>18</sup> *Ibid*

In addition to the above discriminative provisions, the Act fails to effectively protect women from asset stripping, eviction and harmful cultural practices such as widow cleansing and widow inheritance. The Act mentions about protection of the deceased estate and not the beneficiaries. The Protection against Domestic Violence Act No. 2 of 2015 prohibits forced widow inheritance, assault and eviction. It will be prudent for the Act to create offences and penalties for certain actions such as eviction, forced widow inheritance and coercion.

h) Act fails to recognize the new property regime

A lot has changed since 1981, the establishment of the National Land Policy in 2009; the promulgation of the Constitution in 2010; and the enactment of land and property related laws. The Act must conform to the current regime. For example, with the Matrimonial Property Act of 2013 in place, the Act should recognize matrimonial property and make provision of its distribution upon the death of a spouse.

The Constitution calls upon parliament under Article 68 (2) (vi) to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land. This is yet to be achieved.

### 3.0. KEY POLICY CONCERNS

#### 1. Conflict of the Law of Succession Act, CAP 160 with Constitution of Kenya 2010

The Constitution is the supreme law of the land and *“Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid”*<sup>19</sup>

Sections 2 (2), (3) and (5), 32, 33, 35(1), 35(5), 36(1), and 39 (1) a) of the Act discriminate against children born out of wedlock, Muslims, women and girls and widows. These provisions do not conform to the equality provision under Article 27 of the Constitution. In addition, rules of international law shall form part of the Laws of Kenya and any treaty or Convention ratified by Kenya shall form part of the Laws of Kenya. The discriminative provisions are against regional and international human rights instruments that Kenya has ratified including International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (Maputo Protocol)

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<sup>19</sup> Article 2(4)



## **2. The Law of Succession Act , CAP 160 does not conform with existing laws**

After the promulgation of the Constitution, parliament embarked to review and enact legislations that conform to the Constitution and support the implementation of the Constitution. Key legislation that promote the respect of women land rights include; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Matrimonial Property Act No. 49 of 2013 and Community Land Act No. 27 of 2016. Whereas the Marriage Act No. 4 of 2014 and Protection against Domestic Violence Act No. 2 of 2015.

Matrimonial property and Community Land must be recognized in the Law of Succession and this will offer better protection for women. In addition, recognition of the marriage regimes under the Marriage Act of 2014 will offer better security for women.

In addition, the Act is silent on violations women and children go through after the death of their spouses. Asset stripping; evictions; physical and mental abuse; and forced wife inheritance are some examples of violations women go through after the death of their spouses. The Protection against Domestic Violence Act No. 2 of 2015 prohibits certain violations against widows. The Act should have specific provisions creating offences and penalties that will address any form of cruel, degrading and inhuman treatment against the deceased beneficiaries.

## **3. Access to Justice**

Access to justice is as constitutional right, however the succession process in Kenya is complex, expensive time consuming. This has seen many women especially in the rural areas fail to pursue succession in order to protect their interest<sup>20</sup>. Succession process requires one to file requisite documents in court. The Judiciary is mandated to promote access to justice for all and it should ensure succession process is accessible to all. Further, the Act needs to embrace ADR including traditional justice dispute resolution mechanism especially when dealing with contentious probate.

## **4. Lack of awareness**

The Law of Succession has been in existence for over three decades, but woman continue to suffer human rights violations. For example despite the provision under the Act on daughters' right to inherit, many are unable to claim this right due to lack of awareness on the existence of the law and unresponsive government responses.

## **4.0.POLICY RECOMMENDATIONS**

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<sup>20</sup> Human Rights Watch Report *Double Standards: Women's Property Rights Violations in Kenya*. New York: (2003)

1. Review of Law of Succession Act by deleting discriminatory provisions
2. Review the Law of Succession Act and inserting provisions on;
  - a) Matrimonial property,
  - b) Recognized forms of marriages; and
  - c) Protection of dependants from harmful cultural practices.
3. Engaging in strategic interest litigation to challenge the unconstitutional provisions of the Law of Succession Act.
4. Proper implementation of the existing legal provisions that promote women inheritance rights.
5. Nation-wide awareness creation on the constitutional provision on the extent of applicability of the various customary laws in the communities as it is the misapplication and misinterpretation that in most instances result in violations of women's rights.
6. Engagement with right holders to enable them demands for right rights within the available legal mechanism including seeking for redress in case of violations and agitate for legislative reforms.

## 5.0.CONCLUSION

Women land, property and inheritance right is fundamental human rights guaranteed by the Constitution of Kenya 2010; International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); African Charter on Human and People's Rights (ACHPR) and Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol).

In addition parliament has enacted laws that reinforce women's land and property rights. However, women in Kenya continue to be systematically marginalized from enjoying their land, property and inheritance rights. This is as a result of various factors including the deficiencies in the Law of Succession Act CAP 160 that hinders full realization of women's land, property and inheritance rights.

While the Act makes provision for protection of women's inheritance rights, it does contain discriminatory provisions and does not address the present day inheritance situation... The varied pronouncement by the courts on various provisions of the Law of Succession Act further complicates the situations.

Consequently, the Law of Succession Act needs to be amended to conform to the existing progressive constitutional and legislative provisions

## REFERENCE

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**ANALYSIS OF THE LAW OF SUCCESSION ACT AND ITS IMPACT  
ON WOMEN'S LAND, PROPERTY AND INHERITANCE RIGHTS IN  
KENYA**



## ACKNOWLEDGMENTS

## LIST OF ACRONYMS AND ABBREVIATIONS

ADR	Alterative Disputes Resolution
AIDS	Acquired Immunodeficiency Syndrome
CBO	Community Based Organizations
FBO	Faith Based Organizations
KELIN	Kenya Legal and Ethical Issues Network on HIV & AIDS
HIV	Human Immunodeficiency Virus (HIV)

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## 1.0. EXECUTIVE SUMMARY

Land and property rights determine women's living conditions and their family survival especially in the rural areas<sup>1</sup>. In rural Kenya, women not only rely on land for food produce but also a source of income generating and are able to access health care services and educational opportunities for themselves and their families<sup>2</sup>. Despite the importance of these rights, discriminatory cultural practices and laws continue to inhibit the realization of women's land and property rights.

Kenya has taken progressive steps in elevating the status of women's land and property rights in the past years. The promulgation of the Constitution in 2010 provided better protection for women. The provisions on gender equality and elimination of gender discrimination in law, customs and practices related to land and property<sup>3</sup> are key gains for women's land and property rights.

In addition, parliament has enacted progressive laws on marriage, matrimonial property, private and community land that recognize and protect women's land and property rights. However, reforms on women's right to inherit land and property continue to lag behind. Patriarchy, discriminative legal provisions and inadequate legislation on land, property and inheritance continue to inhibit the realization of women's land and property rights. Cases of asset stripping, widow eviction, forced harmful cultural practices continue to be reported by women across the country.

KELIN has since 2009, been implementing projects that facilitate justice for widows, orphans and vulnerable children who have been denied their lawful right to access, inherit, and own land and property. While implementing the projects, KELIN has established that a major impediment in realizing women's land, property and inheritance rights is insufficient inheritance laws. Whereas there exists the Law of Succession Act<sup>4</sup> that deals with devolution of property of a deceased person; women continue to witness land, property and inheritance violations as the law contains discriminatory provisions and fails to adequately protect them for harmful cultural practices. It is necessary therefore for the Law of Succession Act to be reviewed and amended. This analysis provides justification for the review and amendment.

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<sup>1</sup> OHCHR *Women and land, property and housing*

<sup>2</sup> *Ibid*

<sup>3</sup> Article 27, 60 (f)

<sup>4</sup> CAP 160 Laws of Kenya



## 2.0. INTRODUCTION

Research shows that in Sub-Saharan Africa, land is not only a source of security against poverty; but also provides physical safety; psychological well-being; economic development and defines social status. For women, secure land rights mean that they are able to provide adequate food; shelter and safe water for their families and manage the impact of HIV/AIDs<sup>5</sup>. However, women face barriers to their access, use of, and control over land and property due to inadequate legal protections and discriminatory customary practices within communities.

In Kenya, the 2009 National Land Policy<sup>6</sup> recognizes women's land rights as an issue that requires special intervention. In past seven years, the state has undertaken drastic legal and policy reforms towards protecting women's land and property rights. The progressive 2010 Constitution provides that all persons regardless of their sex and gender have equal rights to own land and property anywhere in the country and prohibits the application of repugnant customary laws and practices. In addition, rules and provisions of international conventions and treaties ratified by the State are part of the laws of Kenya.

Kenyan Parliament has since enacted several laws to give effect to the constitutional provisions on land. Whereas the state has taken necessary legislative steps to ensure legal protection of women's land and property rights; focus has been on mainly on private acquisition and protection of land and property in marriage and upon divorce. Little has been done on land and property inheritance. The Law of Succession Act<sup>7</sup> (herein referred to as the Act) governs the distribution of an estate of a deceased person. The Act governs inheritance matters for all Non- Muslim Kenyans; provides for the protection of deceased estate; and sets up the mechanism which property devolves to the deceased beneficiaries and/or dependants.

Whereas the Act contains certain progressive provision such as; equal right for men and women to inherit property and treating male and female children the same in terms of their right to inherit property from their parents, it fails to adequately protect women's inheritance rights. For instance, the Act does not provide adequate protection for women against asset stripping, eviction and harmful cultural practices; it promotes the use of patrilineal customary practices in distribution of an estate in certain parts of the

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<sup>5</sup> Netherlands Ministry of Foreign Affairs (2011) *Women's Economic Empowerment to Foster Food Security; Case Studies from Developing Countries*

<sup>6</sup> Ministry of Lands and National Land Policy Sessional Paper No. 3 of 2009

<sup>7</sup> CAP 160 Laws of Kenya enacted in 1981.



country<sup>8</sup> and discriminates against widows by relinquishing their inheritance rights when they choose to remarry<sup>9</sup>. Further, the enforcement of this law has been inefficient due to lack of awareness on the existing laws, discriminatory official response, and expensive judicial process<sup>10</sup>. This has seen the application of customary laws which often restrict women's right to inherit land, leaving them vulnerable to dispossession.

The Constitution of Kenya mandates Parliament to revise, consolidate and rationalize existing land laws; enact legislation to regulate the recognition and protection of matrimonial property; and protect the dependants of deceased persons holding interests in any land including the interest of spouses in actual occupation of land<sup>11</sup>. As a result of provision parliament enacted the following laws; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012 and Matrimonial Property Act No. 49 of 2013 which permit women to acquire and own land and property.

Further, marriage and domestic relations determines how women enjoy their land and property rights. The enactment of the Marriage Act No. 4 of 2014 that provides for recognized marriages; and Protection against Domestic Violence Act No. 2 of 2015 that prohibit harmful cultural practices reinforces legal protection of women's land and property rights. Unfortunately, Parliament is yet to amend the provisions of the Act to ensure that it conforms to the Constitution and is aligned with the newly enacted laws thereby disfranchising women. In addition, the ongoing divergent judicial interpretation on certain provisions of the Act presents confusion on the actual position of law making decision-making difficult.

The Constitution is the supreme law of the Republic and any law including customary law that is inconsistent with it shall to the extent of its inconsistent be void<sup>12</sup>. The Act must therefore be reviewed and amended to ensure that it complies with the Constitution and relevant regional and international human rights instruments. The amendments will offer strong safeguards for women's land, property and inheritance rights in Kenya. This research therefore analyses the provisions of the Law of Succession Act and its impact on women's land, property and inheritance rights with an aim of identifying areas for law reforms that will improve the status of women's land and property inheritance rights.

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<sup>8</sup> Section 32 of the Act

<sup>9</sup> Section 35 (1), (3) and 36 (1)

<sup>10</sup> FIDA Kenya *Women's Land and Property Rights in Kenya; Training Handbook* pg 3

<sup>11</sup> Article 68 (a) and (c) (iii) and (vi)

<sup>12</sup> Article 2 (4) of the Constitution of Kenya

### 3.0. ANALYSIS OF THE LAW OF SUCCESSION ACT, CAP 160

This section highlights the development and overview of the Act and its place in the current constitutional and legislative arena with an aim of identifying possible areas for law reform. The section is divided into three parts namely; Pre-Law of Succession Act which covers the period before 1<sup>st</sup> July 1981; Post – Law of Succession Act covering the period after 1<sup>st</sup> July 1981 to date as the law is still applicable to date; and Post Constitution of Kenya that covers the year 2010 to date.

#### 3.0.1. *Pre- Law of Succession Act, CAP 160*

The situation of inheritance rights in Kenya can be traced back to the pre-colonial period where land and property was communally owned and indigenous communities were governed by customary laws with each community applying its own systems<sup>13</sup>. Whereas patriarchy influenced the way of life during this period, women's access to land and property rights were guaranteed and protected under the communal set up<sup>14</sup>. As a result of the patrilineal nature of society, women rarely had rights to own and pass on land to their heirs. The advent of colonialism saw the introduction of different inheritance regimes namely African Customary, African Christian, Hindu and European. African customary law was applicable to the indigenous community provided it was not repugnant to justice and morality.

At independence, the different succession and inheritance regimes continued to apply in different socio-ethnic groups. In addition, only four forms of marriages; Civil, African Christian, Mohammedan and Hindu marriages were expressly recognized by law<sup>15</sup>. Customary marriage only received recognition under the Judicature Act <sup>16</sup> which allows the courts to be guided by African customary law in civil cases so far as it is not repugnant to justice and immorality and inconsistent with any written law. Further, the concept of matrimonial property was alien to the indigenous population and courts were guided by the English Law, Married Women Property Act of 1882 in cases of division of matrimonial property.

It was during this period that individualization and absolute proprietorship of land began. This coupled with new regime governing marriage, property ownership and succession disadvantaged a number of women who lost out on rights including those

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<sup>13</sup> William .M Musyoka *Law of Succession* 2006 Law Africa

<sup>14</sup> Patricia Kamere- Mbote *The Law of Succession in Kenya: Gender Perspective in Property Management and Control* 1995 IELRC

<sup>15</sup> Marriage Act CAP 150, The African Christian Marriage and Divorce Act CAP 15, The Mohammedan Marriage Divorce Act CAP 156 and The Hindu Marriage and Divorce Act CAP 157

<sup>16</sup> Section 3(2) CAP 8



that were customarily protected such as right of access and use of land<sup>17</sup>. For example, African Christians were considered to have adopted the English way of life and therefore English marriage and succession laws were applicable<sup>18</sup>. In *Re Ruenji H.C. Mis. Case No 136 of 1975* and *Re Ogolla (1978) KLR*, the deceased persons in both causes married under African Christian Marriage and Divorce Act (*now repealed*) which did not permit polygamy. The deceased without terminating their first marriage proceeded to marry subsequent wives under customary law. The courts held that the deceased subsequent marriages were *null and void* as they lacked capacity to enter into subsequent marriage. The subsequent wives and their children were therefore not entitled to inherit the deceased estate.

In 1968, the Commission on Law of Succession was set up to consider the existing laws on succession with an aim of making recommendation for a new comprehensive and consolidated law. The Commission work saw the enactment of the Law of Succession Act, CAP No 160 which was assented on 13<sup>th</sup> November 1972, and commencement delayed until in 1<sup>st</sup> July 1981.

### 3.0.2. *Post – Law of Succession Act*

Law of Succession Act was created to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of the estates of deceased persons<sup>19</sup>. The Act initially governed all persons until a 1990 amendment that exempted Muslims from applying the law<sup>20</sup>. The Act; has various provisions that seek to protect and promote the rights of women they include;<sup>21</sup>

- a) Women are permitted to make wills and challenge one if not adequately provide for.
- b) A wife ranks high among the dependants of the deceased husband and a surviving spouse is considered as the most suitable person to take charge of her deceased husband property; and
- c) Children are allowed to inherit without making any preference to a male child and a female child<sup>22</sup>

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<sup>17</sup> Perpetua Wambui Karanja *Women's Land Ownership Rights in Kenya* 1991

<sup>18</sup> *Ibid*

<sup>19</sup> Preamble- Law of Succession Act CAP 160

<sup>20</sup> Section 2 (3) and (4)

<sup>21</sup> Section 5, 26, 29, 35, 36, 37, 38, 39, 40 and 41 of the Act

<sup>22</sup> International Women's Human Rights Clinic Georgetown University Law Center & The Federation of Women Lawyers: Kenya —*Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation* || 2009

However, despite the progressive provisions, the Act contains discriminatory provisions that hinder full realization of women's inheritance rights. Below is an analysis of the discriminate provisions of the Act.

**a) Application of Customary law to persons who died prior to the commencement of the Act<sup>23</sup>**

The Act provides that customary law will apply to persons who died prior to the commencement of the law in 1981. This provision disproportionately affects women as the distribution of a deceased person estate among Kenyan communities is patrilineal whereby women are not allowed to inherit land<sup>24</sup>.

The courts have made varied pronouncement on the matter. For example in *Re Estate of Mutio Ikonyo (deceased) & Peter Mutua Ngui & 2 Others (2006) eKLR* the court ruled that customary laws of the deceased persons will apply in the distribution of the deceased estate thereby disinheriting female members of the deceased. However, another judge in *Re Estate of Pricilla Wairimu Kamau (2005) eKLR*, ruled differently that whereas the deceased died prior to the enactment of the Act, customary laws that discriminate against women (on inheritance) could not be applicable since they are repugnant to justice.

It was believed that the Court of Appeal in case of *Rono -vs- Rono (2006) 1 LKR (G&F)* brought to an end the justification of using customary law to disinherit women by allowing the daughters of the deceased to inherit his estate. However, in 2013 the learned judge in *Re the Estate of Kiguta Mukei alias Kiguta Mukii (Deceased) [2013] eKLR*; ruled that since the deceased passed away in November 1977, the applicable law was Kikuyu Customary laws which do not allow women to inherit. The objector having been a female was deprived of her inheritance rights.

It is clear that the provision coupled with the varied court pronouncements is harmful to the realization on women's land, property and inheritance rights. In addition the provision contravenes the constitutional provisions on supremacy of the Constitution and equality and non-discrimination<sup>25</sup> and should therefore be deleted.

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<sup>23</sup> Section 2 (2)

<sup>24</sup> Cotran, E. (1969) *Reinstatement of African Law Kenya II The Law of Succession 2* London: Sweet and Maxwell

<sup>25</sup> Article 2 and 27



## **b) Exclusion of application of the Act by Muslims<sup>26</sup>**

The Act does not apply in cases where the deceased person was a Muslim. The provision allows for the mandatory use of Islamic law thereby denying surviving spouse or children regardless of their religion and gender the right to choose the succession regime to apply. The Constitution of Kenya under Article 24 (4) allows for application of Muslim law before the Kadhi's court to persons who profess the Muslim religion in matters relating to personal status, marriage, divorce and inheritance.

However, Article 170 (5) provides that the jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts. In *R.B & R.G.O v H.S.B & A.S.B [2014] eKLR* the learned judge ruled that the profession of Muslim faith is distinct from the necessary ingredient of submission to the jurisdiction of the Kadhi's Court to deal with the personal law matters of marriage, divorce and inheritance of Muslims. To compel all Muslims to subject themselves to the jurisdiction of the Kadhi's Court would be contrary to all notions of choice which is the basis of rights and freedoms in the Bill of Rights. He stated;

*'...Hence the provision is for the Muslims to submit, rather than compulsion to subject themselves, to the jurisdiction of the Kadhi's Court...'*

This provision should be amended to remove the compulsive provision on application of Islamic law.

## **c) Discrimination against child or children born out of wedlock<sup>27</sup>**

Section 3 (2) of the Law of Succession Act states:

*'...References in this Act to 'child' or 'children' shall include . . . in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility...'*

This provision presents the notion that paternity is optional and renders the ability of a child born out of wedlock to have a legal relationship with their father only subject to the father's recognition and acceptance. Section 3(3) further limits the rights of children born out of wedlock by extending this optionality to those related to an unwilling

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<sup>26</sup> Section 2 (2) and (3)

<sup>27</sup> Section 3 (2) and (3)

father: A child born out of wedlock is also precluded from enjoying relationships to other persons through their fathers if the father has not recognized, accepted, or assumed responsibility for them per Section 3(2). Thus, if a father does not wish to have a relationship with his child born out of wedlock, the Act completely precludes the child from inheriting from the father's relatives, for example the child's paternal grandparents.

The recognition of a legal connection between a father and his children born out of wedlock is vital under the Law of Succession Act because, without it, the children are precluded from enjoying rights vis-à-vis unwilling fathers that makes references to the words "child" or "children." The sections that would preclude children born out of wedlock include Section 26 and 38 of the Act. The provision assures a child born out of wedlock parental care and protection from the mother during the mother's life and beyond her death, even if a mother never acknowledged or raised the child during her lifetime. However, the same is not true for the father.

This provision is unconstitutional because it violates the rights and fundamental freedoms of children born out of wedlock and unmarried women in the area of inheritance. Constitution under Article 53 (1) (e) provides that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not. In making reference to the Constitution, the Constitutional Court in South Africa in *Bhe and Others v. Magistrate, Khayelitsha and Others 2005 (1) SA 580 (CC)* ruled that a law which denied children born out of wedlock the right to intestate succession from their fathers was unconstitutional.

#### **d) Security in marriage<sup>28</sup>**

Section 3 (5) of the Act reads;

'...Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act...'

This provision affects women in monogamous and polygamous marriage and those in cohabiting relationships. A person married under the Civil and African Christian

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<sup>28</sup> Section 3 (5)



Marriage Act (*repealed*) and the Marriage Act (*repealed*) we incapable of contracting a valid marriage under any customary law and this informed the jurisprudence in **Re Ruenji H.C. Mis. Case No 136 of 1975** and **Re Ogolla (1978) KLR**. However, the amendment of Section 3 (5) when the Act come into force in 1981, saw courts allow women married under customary law by a man who had previously married under statute as wives and their children as children for the purpose of the Act and therefore entitled to a share in the estate of a deceased person.

The court in **Matter of Estate of Reuben Nzioka Mutua (deceased) P&a Cause No. 843 of 1986**, gave different interpretation of the Section, by stating;

*“... I see the amendment (Section 3(5) ) as having been brought in to cater for women married under customary law who were either neglected or abandoned by their husbands during his lifetime.....if it is interpreted any other way it would render useless any marriage under statute...”*

This interpretation was reversed by the Court of Appeal in **Irene Njeri Macharia v. Margaret Wairimu Njomo and another Nairobi Court of Appeal Number 139 of 1994 (1996) eKLR** where the court ruled that notwithstanding the provisions of Section 37 of the Marriage Act (*repealed*), a woman married under a system which recognizes polygamy is a wife purposes on succession only.

The High Court in **Jessica Atieno Onyony V Cecilia Angela Marwah & another [2006] eKLR** gave a different interpretation of the section. Justice Kubo ruled that the deceased having not dissolved his monogamous marriage, had no capacity to marry another woman during the subsistence of the marriage and his purported customary marriage was, therefore, a nullity and incapable of conferring upon the applicant the status of a wife as far as statute law is concerned.

The court in 2017 was guided by the Court of Appeal decision in the matter of **Re estate of T.O.O (Deceased) [2017] eKLR** and proceeded to recognize a woman married under Luo customs as a wife under the Act despite the deceased having contracted a statutory marriage with his first wife. It is worth to note that the court in **Irene Njeri and Jessica Atieno** cases recognized the children born by subsequent wives as dependents.

It is clear that the provisions of Section 3 (5) invalidate the equality in marriage under the constitution since it denies women security in marriage especially when they

transact monogamous marriages.<sup>29</sup> The contradicting interpretation of the Section by the courts hinders seamless implementation of the provision.

In addition to recognized marriages, courts have interpreted this provision to allow women in cohabiting relationships considered as dependants. However, the courts have set criterion before presumption of marriage declaration is made. In *Mary Njoki v. John Kinyajui Muthuru and others Civil Appeal No. 71 of 1984* the court stated that a party needs to

*“...establish long cohabitation and acts of general repute..... there has to be evidence that the long cohabitation is not a mere friendship between a man and a woman, that she is not a concubine but that it is safe to presume there is a marriage...”*

In *M.W.G v E.W.K [2010] eKLR*, the judge further ruled that the existence or otherwise of a marriage is a question of fact and is not dependent on any system of law except where by reason of a written law it is excluded. He proceeded to state;

*“... a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife...”*

The above interpretation implies that where a deceased contracted a marriage under statute, for purposes of Section 3 (5) cohabitation cannot be presumed as a marriage and therefore a cohabitee cannot be regarded as a wife.

#### **e) Discrimination based on social origin <sup>30</sup>**

Sections 32 of the Act exempts the application of intestacy in agricultural lands, livestock, and crops in certain areas of Kenya<sup>31</sup> and under 33 of the Act customary laws of the deceased shall be applied when distributing the deceased estate. According to Cotran, the laws applicable in those regions are patrilineal and therefore disadvantage women. The *gazetted* areas are mainly pastoral areas where mainly agricultural land, livestock, and crops are often the only property that the deceased person owned or for which the person had use rights and therefore they constitute the only property available to the widow to keep her out of poverty. The exclusion of these region based

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<sup>29</sup> Patricia Kamere- Mbote *The Law of Succession in Kenya: Gender Perspective in Property Management and Control* 1995 IELRC

<sup>30</sup> Section 32, 33

<sup>31</sup> These areas are; West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado, and Narok



on their social structures and the application of customary law in these areas violate Kenyan women's rights<sup>32</sup>

**f) Discrimination based on gender<sup>33</sup>**

Widows inheritance rights are relinquished upon subsequent remarriage under Sections 35 (1) and 36 (1) of the Act. The provision discriminate against widows who choose to remarry by stripping them of their property interest upon remarriage but the same treatment is not accorded to the widowers. This means that a widow will lose her right to live in the marital home if she chooses to remarry, but a widower will be allowed to remain in the marital home if he decides to remarry<sup>34</sup>.

Further, there is need to move beyond providing a spouse life interest over land. For women especially, life interest is not a guarantee that her interests will be protected unless such interest is registered. In *Festus Madegwa Ashimolela and Anor. vs Zembeta Samuel (2006)* eKLR Justice GBM Kariuki held that ...." *The...widow shall have life interest in the said land. The life interest of the ...widow will not be safeguarded nor will the order have meaning unless the land remains in the hands of the heirs. Accordingly, I order that there shall be registered against land parcel No. Isukha/Shitochi/1493 an inhibition order to prevent registration of any dealing in the said parcel...*"

In addition, a under Section 39 (1) a), a father is granted priority to inherit a deceased person's estate and a mother is only allowed to inherit under Section 39 (1) b) if the father is deceased. This provision discriminates against women by preferring fathers over mothers to inherit.

**g) The Act fails to adequately protect women from harmful practices**

In addition to the above discriminative provisions, the Act fails to effectively protection of women from asset stripping, eviction and harmful cultural practices such as widow cleansing and widow inheritance. The provision on intermeddling with the estate of a deceased<sup>35</sup> is not exhaustive to protect the dependants from cruel, degrading and inhuman treatment. The practice of widow eviction, forced wife inheritance and asset striping continues to be practiced and the land is silent about these violations. There is need for inclusion criminalizing such practices in order to better protect women's land, property and inheritance rights.

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<sup>32</sup> International Women's Human Rights Clinic Georgetown University Law Center & The Federation of Women Lawyers: Kenya —*Empowering Women With Rights to Inheritance—A Report on Amendments to the Law of Succession Act Necessary to Ensure Women's Human Rights: A Human Rights Report and Proposed Legislation* || 2009

<sup>33</sup> Sections 35 (1) b) , 36 (1) c)

<sup>34</sup> *Ibid*

<sup>35</sup> Section 45

### 3.0.3. *The Law of Succession Act post -Constitution of Kenya 2010*

Prior to the promulgation of the Constitution, the 2009 National Land Policy<sup>36</sup> recognized that women's land rights was an issue that requires special intervention. The policy call for the state to; enact appropriate legislation to ensure effective protection of women's rights to land and repeal existing laws that discriminate against women in relation to land<sup>37</sup>. The Constitution was the first legal document to incorporate some of the National Land Policy recommendations.

The promulgation of the Constitution of Kenya in 2010 was a great achievement for Kenya women. The Constitution is the supreme law of the land and the yardstick by which all other laws are judged. It prohibits laws including customary laws that violate the Constitution<sup>38</sup>; prohibits any form of discrimination against any person regardless of any status<sup>39</sup>; and calls for parliament to ensure that laws are enacted to give effect to the Constitution.

On land and property, the Constitution establishes, public, private and community land and principles of land policy include; security of land rights and elimination of gender discrimination in law, customs and practices related to land and property in land<sup>40</sup>. Women inheritance right applies to private and community land. Under Article 69, parliament is mandated to; revise, consolidate and rationalize existing land laws; and enact legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land<sup>41</sup>.

Further, the Constitution under Article 2 (5) and (6) provide that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the law of Kenya. Key international and regional human rights instruments ratified by Kenya that promote the protection of women's land, property and inheritance rights include;;

- a) Universal Declaration of Human Rights (UDHR)
- b) International Covenant on Economic, Social and Cultural Rights (ICESCR)
- c) International Covenant on Civil and Political Rights (ICCPR)

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<sup>36</sup> Ministry of Lands and National Land Policy Sessional Paper No. 3 of 2009

<sup>37</sup> Ibid Clause 223 a) and b)

<sup>38</sup> Article 2(4)

<sup>39</sup> Article 27

<sup>40</sup> Article 60 (1) b) and f)

<sup>41</sup> Article 68 a) and c) vi)



- d) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- e) African Charter on Human and People's Rights (ACHPR)
- f) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol)

After the promulgation of the Constitution, parliament embarked to revise and enact new laws. Specific to women land and property rights, parliament enacted the following laws; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Matrimonial Property Act No. 49 of 2013 and Community Land Act No. 27 of 2016. Whereas the Marriage Act No. 4 of 2014 and Protection against Domestic Violence Act No. 2 of 2015 do not specifically deal in land and property rights their application directly affects women's land and property rights. The Law of Succession Act is yet to be revised to confirm to the constitutional provisions.

*a) Land Act No. 6 of 2012*

The Act consolidates previous existing land laws to ensure compliance with the law. The Act makes provision on management and administration and land. Specific to women's land rights, the Act defines Matrimonial home as "...any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home..." and matrimonial property as "...any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage...". It further provides under Section 5(2) that there shall be equal recognition and enforcement of; and rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.

The Law of Succession is silent on matrimonial home/property. It only defines a house to mean a family unit comprising a wife, whether alive or dead at the date of the death of the husband and children of that wife. The law should therefore make provision for protection and distribution of matrimonial home. In addition, the Act should make provision inhibiting discrimination of women's inheritance rights in all land tenure systems.

*b) Land Registration Act No. 3 of 2012*

The act deals with all registration and/or any dealing in land. It provides for registration framework. Under Section 93, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the

Matrimonial Property Act. A spouse has overriding interest to registered land and requires spousal consent for disposition of land. The act further allows through the appropriate office, the registration of inhibitions, cautions and restrictions to protect an interest over land.

In addition to recognizing matrimonial property in dealing with a deceased estate, the Law of Succession Act should have provisions where an estate can be protected by officers other than police or chief. These officers could include judicial officer or land registers that can facilitate the registration of inhibitions, cautions or restriction in accordance with the Land Registration Act. Currently, the Law of Succession provides for protection against intermeddling with the estate of a deceased person though there is no definition of the term "intermeddling".

*c) Matrimonial Property Act No. 49 of 2013*

The Act provides for the rights and responsibilities of spouse in relation to Matrimonial Property. Under Section 2, contribution is defined under to include monetary and non-monetary contribution; matrimonial home defined as any property owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and spouse defined as husband and wife.

Matrimonial Property is defined under Section 6 as; matrimonial home(s), household goods and effects in the matrimonial home (s); any other immovable or movable property jointly acquired during the subsistence of the marriage. Trust property, including that held under customary trust and immovable property acquired or inherited before marriage does not form part of matrimonial property.

On ownership, Matrimonial Property vests in spouses according to their contribution towards its acquisition and shall be divided between spouses if they divorce or their marriage is otherwise dissolved<sup>42</sup>. The Act makes provision for division of matrimonial property in polygamous marriage.

Whereas division of matrimonial property can only be done after marriage is dissolved, a party can move to court under Section 17 for declaration or rights to any property that is contested between that person and former spouse. A spouse shall not during the subsistence of the marriage be evicted by a spouse from the matrimonial home except by a court order and shall not be evicted by *any other person* except; in execution of a decree; bankruptcy or power of sale where property was mortgaged or charged. This

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<sup>42</sup> Sec 7



provision protects women from eviction and the Act should also offer similar protection for widows against eviction by any person upon the death of their husbands.

In the case *Rono v Rono* (2005) eKLR the deceased died intestate leaving behind two wives and nine children (six daughters and three sons). The two widows and a son petitioned the court for letters of administration with the consent of the other family members. The contention arose over the distribution of the deceased estate where sons and the 1<sup>st</sup> wife were allocated large shares while the 2<sup>nd</sup> wife and daughters wanted 50:50 share of the estate. The 1<sup>st</sup> wife argued that prior to the deceased marrying the second wife; she had contributed to the development of a farm therefore entitled to larger share. The the sons argued that since they were sons and the daughters were married, they were entitled to a larger share to their sisters. The court ruled that both the sons and daughters have rights to inherit their father's estate and proceed to share the property equally.

The court did not consider the argument on spousal contribution since it was not a factor under Section 40. The learned judges embraced the principal of *fairness* and *equity* in distribution of a deceased's estate between or amongst persons beneficially entitled thereto

Matrimonial Property should be factored in during the distribution of property in both monogamous and polygamous marriages. A spouse should automatically be allocated matrimonial home and household goods and thereafter his/her contribution toward acquisition of other properties be considered. In determining the share including in polygamous unions, the court should be guided by fairness and equity as decided in *Sophia Wang chi Mugo v Geoffrey Wambugu Mugo & another* [2016] eKLR. This argument was shared by Kiage JJA in his concurring judgment in *P.N.N -vs-Z.W.N* (2017) eKLR where he observed that marriage is a relationship of equals and that equality in the Constitution doesn't mean Matrimonial Property should be divided equally but

*"...division and distribution of Matrimonial Property should be on a basis of fairness and conscience and not a romantic clutching on the 50:50 mantra..."*

On whether inherited property forms part of matrimonial property, the court in *J E N K v J N K* [2015] eKLR held that under Section 5 (of the Matrimonial Property Act), the only time such property would not form part of matrimonial property is where the inheritance was received before the marriage. In this case, the asset in question was inherited during matrimony and therefore it forms part of matrimonial property.

*d) Community Land Act No. 27 of 2016*

The Act provides for the recognition, protection and registration of community land rights and its managements and administration.

Section 30 provides that every members of the community has the rights to equal benefit from community land which includes full and equal enjoyment of rights of use and access; and women, youth and marginalized groups have the right to equal treatment in dealing with community land. In addition, it provides that women married to a member of the community shall gain automatic membership of the community and such membership shall subsist until a legal divorce.

The Act calls for use of ADR to settle disputes concerning community land<sup>43</sup>. The Law of Succession identifies 12 regions which are predominately occupied by pastoral communities who hold land communally. The Act calls for use of customary laws which predominantly discriminate against women. The Act needs to be amended to reflect provisions of this land tenure system and how women's inheritance rights can be protected in such set up including the use of ADR.

*e) Marriage Act No. 4 of 2014*

The Act was enacted to amend and consolidate the various laws relating to marriage and divorce. It recognizes Customary, Civil, Islamic, Hindu and Christian marriages with Islamic and Customary marriages presumed polygamous or potentially polygamous<sup>44</sup>; and sets out the requirement for each marriage. All marriages must be registered; this addresses the old age challenge of proving customary marriage. Women have experienced challenges in proving customary marriage especially when certain key customary rules were not followed. In *GITUANJA vs GITUANJA (1983) KLR* it was held that the existence of customary marriage was a matter of fact which is proved with evidence. The Act makes the existence of customary marriage a matter of law.

The Act has similar definition of spouse as the Matrimonial Property Act and outlaws child marriages. Widows and widowers have a right to marry or not to re-marry under Section 15.

While the law does not recognize cohabitation as a form of marriage, it defines cohabit as

... to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage...

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<sup>43</sup> Section 39 (1)

<sup>44</sup> Section 6



As stated earlier; whereas cohabitation is not formally recognized under statutes, courts have developed common law principle on presumption of marriage conferring some marital rights and duties on cohabiting couples meeting certain criteria.

The recent decision under the new marriage region being the case of *RLA v FO & Another (2015) eKLR* where Justice Mayeba ruled that under Section 6 of the Marriage Act, 2014 only five types of marriages are recognized in Kenya (Christian, Customary, Civil, Hindu and Muslim) and while long cohabitation is not recognized under the Act, the Act does not do away with those relationships where couples have lived together as man and wife for years and even resulted into children. While agreeing with set out criteria on presumption of marriage which include; actual cohabitation, the length of the cohabitation, and whether the man and woman held themselves out as husband and wife; the court further included that their lifestyle should show even to strangers that they are married and not in a relationship of convenience.

Justice Musyoka in *S.W.G- v- H.M.K (2015) eKLR* where he stated

*"...where a marriage does not comply with the relevant formalities laid down by the Marriage Act ....it may be rescued by presumption of marriage by cohabitation..."*

The alignment of the Law of Succession Act to the Marriage Act will help address the unresolved interpretation of Section 3 (5). At the time of enacting the Law of Succession, there was no law that expressly governed customary marriage; this would be the reason why parliament inserted Section 3(5). Women in cohabiting relationship can still have their inheritance rights protected under common law principles. In addition, the definition of dependants under the Act needs to conform to the reality of life. For example the definition of a dependant as former wife or wives whether or not maintained by the deceased prior to his death should change.

The recent pronouncements by the court on spousal maintenance *vis-à-vis* Article 45 (3) of the Constitution should guide in determining a dependant. In *M S V v S J V & another [2015] eKLR* Justice Lenaola stated;

*'...Article 45(3) is in harmony with Article 21(3) of the Constitution which enshrines equality of men and women and specifically states that "women and men have the right to equal treatment.....the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore ...'*

He further held that: -

*'...neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner...'*

Another form of marriage that is not recognized under statute is the woman to woman marriage. The old age tradition that is slowly dying off is common among the Kisii, Kuria and Kalenjin communities. The practice involves a woman mainly of an advanced age with no children or son pays bride price and marries another woman. There is no sexual encounter between the women.

Women take wives under three circumstances; barren women and widows take wives to obtain rights over children produced; rich women accumulate wives to gain prestige and wealth in the same way men do through polygamy; and in some societies where women have the right to have a daughter-in-law, women without sons can exercise their right to a daughter-in-law by marrying a woman and giving her to a non-existent son<sup>45</sup>. A woman married under this form of marriage has been considered as a wife and allowed to inherit by the court in *Eunita Anyango Geko and another vs Philip Obungu Orinda (2013) eKLR* and *Monica Jesang Katam v Jackson Chepkwony & Ano. (2011) eKLR*.

*f) Protection against Domestic Violence Act No. 2 of 2015*

The Protection against Domestic Violence Act aims at protecting persons in a domestic relationship from violence. The Act has broad and not exhaustive definition of domestic violence. Domestic violence under Section 3 includes abuse such as forced wife inheritance and any other conduct against a person where such harm may cause imminent harm to the safety, health and wellbeing of the person. Domestic relationship is described to include; living with the same household with that person or a family member of that person and family members include; spouse, children, adult son/daughter, parent, siblings or other relatives such as grandparents, uncles, aunt, father in-law and mother in-law<sup>46</sup>. The Act gives power to the court to issue protection orders.

The Law of Succession Act is silent on violations such as forced widow inheritance, asset stripping and eviction of deceased persons' beneficiaries, therefore not providing adequate protection to women.

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<sup>45</sup> R.J Cadigan *Woman-to-woman marriage: practices and benefits in Sub-Saharan Africa Journal of Comparative Family Studies* Spring 1998

<sup>46</sup> Section 4 and 5



#### 4.0. KEY ISSUES

The most pressing obstacle to gender equality in women land, property and inheritance rights is insufficient laws and patriarchy that subordinates women to men. According to the United Nations Division for the Advancement of Women (as it was then referred), widows in Africa irrespective of ethnic group are among the most destitute women in the region since they are mostly subjected to patriarchal customary practices, confront discrimination in inheritance rights, lose social status and are marginalized. Human Rights Watch in 2003 reported that majority of women's inheritance rights violations occur since they revolve around land and property grabbing by the deceased relative and linked the high HIV/AIDS pandemic to women's inheritance rights violations<sup>47</sup>.

In recognition of the importance of women's land rights and in meeting their international and regional human rights obligations, Kenya has undertaken constitutional, legislative and policy reforms aimed at abolishing discriminatory laws and policies that inhibit the realization of women's land rights. A progressive Constitution and laws that promote the realization of women's land rights are some of the key achievements the state has taken. However, on women's inheritance rights; the Country is still pegged in an old legislation that inhibits the realization of women's inheritance laws.

While the Law of Succession Act has progressive provisions aimed at promoting women's inheritance rights, the same law also has discriminative provisions and fails to adequately protect women's rights. The following are key identified shortcoming of the Law of Succession Act;

##### 1. Conflict with Constitution of Kenya

The Constitution is the supreme law of the land and *"Any law, including customary law that is inconsistent with this constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid"*<sup>48</sup>

Sections 2 (2), (3) and (5), 32, 33, 35(1), 35(5) and 36(1) of the Act discriminate against children born out of wedlock, Muslims, women and girls and widows. These provisions do not conform to the equality provision under Article 27 of the Constitution. In addition rules of international law shall form part of the Laws of Kenya and any treaty or Convention ratified by Kenya shall form part of the Laws of Kenya. The

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<sup>47</sup> Netherlands Ministry of Foreign Affairs (2011) *"Women's Economic Empowerment to Foster Food Security; Case Studies from Developing Countries*

<sup>48</sup> Article 2(4)

discriminative provisions are against the following regional and international human rights instruments that Kenya has ratified;

- a) Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- b) Article 2, 3 and 26 of International Covenant on Civil and Political Rights (ICCPR);
- c) Article 2, 15 and 16 of Convention on the Elimination of All forms of Discrimination Against Women (CEDAW);
- d) Article 2 Convention on the Rights of Children (CRC);
- e) Article 2, 3 , 18 (3) of the Africa Charter on Human and People's Rights (ACHPR);
- f) Article 2 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) .

Further under Article 60 (1) f), of the Constitution, parliament is required to enact legislation to protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land. Further, Section 7 (1) of the 6th schedule of the Constitution 2010 provides:-

*"All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications, and exceptions necessary to bring it into conformity with this constitution".*

The Act is yet to be amended to conform to the Constitution.

The Committee on the Elimination of Discrimination against Women (CEDAW) in its concluding observation of the Kenyan government's 7<sup>th</sup> period report in February 2011 applauded the government for enacting a Constitution that gives legal recognition of women's land and property rights.

However, CEDAW was concerned about; the existing legislation that permitted women's land and property disinheritance; and stereotypes and harmful cultural practices that perpetuates discrimination against women. It called upon the state to enact necessary legislation and put in place comprehensive steps including awareness creation to modify or eliminate harmful cultural practices that hinder the realization of women's rights.



In March 2016, the Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observation to Kenya's combined 2<sup>nd</sup>- 5<sup>th</sup> period report reiterated CEDAW's observation on need to review legal provisions that allow for discrimination against women.

*Appendix 1 is matrix on areas of the Act that need to be amended.*

## **2. Non – conformity with existing laws**

After the promulgation of the Constitution, parliament embarked to review and enact legislations that conform to the Constitution and support the implementation of the Constitution. Key legislation that promote the respect of women land rights include; Land Act No. 6 of 2012, Land Registration Act No. 3 of 2012, Matrimonial Property Act No. 49 of 2013 and Community Land Act No. 27 of 2016. Whereas the Marriage Act No. 4 of 2014 and Protection against Domestic Violence Act No. 2 of 2015.

Land Act, Land Registration Act, Matrimonial Property Act all recognizes matrimonial property. Matrimonial property is defined as matrimonial home(s), household goods and effects in the matrimonial home (s); any other immovable or movable property jointly acquired during the subsistence of the marriage<sup>49</sup>. Rights and responsibilities of spouses in relation to Matrimonial Property are recognized by law. The Act should therefore adopt the definition and concept of matrimonial property especially in determining distribution of a deceased estate.

A number of women in Kenya live in a communal set-up where land is governed by the Community Land Act. The Act give equal rights and benefits to all community members including full and equal enjoyment of rights of use and access. The Community Land Act recognizes inheritance<sup>50</sup> in community land. The Act should make provision of how property in a communal set up should be distributed upon death.

On marriage, the Act does not define marriage and this has seen different judicial interpretation of Section 3(5) of the Law of Succession Act. The Marriage Act sets out the recognized marriages in Kenya and what constitutes a valid marriage. Marriage is a key element in succession; the Act therefore must ensure that the necessary provisions of the Marriage Act are integrated in the Act.

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<sup>49</sup> Section 6 of the Matrimonial Property Act No. 49 of 2013

<sup>50</sup> The provision of inheritance discriminate against widows who choose to remarry.



The Act is silent on violations women go through after the death of their spouses and parents. Asset stripping; evictions; physical and mental abuse; and forced wife inheritance are some examples of violations women go through after the death of their spouses. The Section on intermeddling focuses on the property as opposed to the beneficiaries. Protection against Domestic Violence Act No. 2 of 2015 prohibits certain violations against widows; however the same is not exhaustive. The Act should have specific provisions criminalizing cruel, degrading and inhuman treatment against the deceased beneficiaries. The Act should also make provision on having other officers to protect the estate and beneficiaries of a deceased. This would included elders and land registrars.

### **3. Access to Justice**

Access to justice is as constitutional right. Specifically, Article 48 provides that state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice. The Succession process in Kenya involves filing the requisite documents in the right court. The process is complex, expensive and takes approximately at least 9 months to complete. Backlog of cases, complex processes, and high litigations cost has seen many women especially in the rural areas fail to pursue succession in order to protect their interest<sup>51</sup>. There is need to ensure that process is accessible to all.

In addition, ADR including traditional justice dispute resolution mechanism is now an accepted mode of resolving disputes. The Act should allow for use of ADR especially when dealing with contentious probate.

### **4. Lack of awareness**

The Law of Succession has been in existence for over three decades, but woman continue to suffer human rights violations. For example despite the provision under the Act on daughters<sup>52</sup> right to inherit, many are unable to claim this right due to lack of awareness on the existence of the law and unresponsive government responses. This challenge has been brought by social biasness and lack of proper implementation and enforcement mechanisms of the existing laws<sup>53</sup>.

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<sup>51</sup> Human Rights Watch Report *Double Standards: Women's Property Rights Violations in Kenya*. New York: (2003)

<sup>52</sup> Section 35 and 38

<sup>53</sup> R. Giovanelli, *Gender and Land Tenure Reform* in ONE BILLION RISING (2009) pg. 198

The Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observation to Kenya's combined 2<sup>nd</sup>- 5<sup>th</sup> period report in 2016 called upon the government to need to take all necessary measures including raising awareness among women, local administration, traditional leaders, land administrators and judicial officers on women's land rights. In addition, CESCR further called upon the state to provide legal support to women to reclaim their rights.

## 5.0. RECOMMENDATIONS

Based on the analysis, various interventions are required to address the challenges women face in land, property and succession matters. Below are recommendations aimed at addressing the challenges;

### a) Parliament

In consultation with other stakeholders, parliament is called upon to review and harmonize the Law of Succession Act CAP 160 and ensure it conforms to the provisions of the Constitution of Kenya 2010. In addition as an oversight body, parliament should monitor government agencies and ensure women's land; property and inheritance rights are protected and fulfilled.

### b) Judiciary

Tasked with the duty of enforcing and interpreting laws, there is need for the Judiciary to create jurisprudence that promotes women's land and inheritance rights. In addition, it should review the Law of Succession Rules to ensure that it promotes access to justice to women.

### c) Other government agencies

Government agencies including Independent Constitutional Commissions need to engage in awareness creation on existing provisions of the law that promote inheritance rights. Where applicable, present relevant reports for example, a report to parliament to help push for law reforms. In addition, though the Legal Aid Programme government should offer legal services to the indigent women whose rights have or are under actual threat of violations. Government agencies should further collaborate with other others in order to promote women's land and property rights.

### d) Civil Society Organizations

As a government watch dog, CSOs need to engage in lobbying for law reforms and provide legal aid services to women whose land, property and succession rights have

been violated. In provision of legal aid services, CSOs should also engage in strategic impact litigation to challenge the unconstitutional provisions of the Law of Succession Act, CAP 160. Further, using their existing network, CSOs should engage in awareness creation on the existing laws that promote women's land rights and build the capacity of communities to demand for their rights.

e) Community members

As right holders, community members need to hold the state accountable for its actions. Community members are requested to form synergies with state and non-state actors for effective legal reforms. In addition, community members need to seek redress when their rights are violated.

## 6.0. CONCLUSION

This analysis has established that while the Law of Succession has provisions that protect women's inheritance rights, it contains a number of provisions that are discriminatory hence unconstitutional. In addition, the law does not conform to the current laws that govern marriage and land. This shortcoming places women in a state where their land rights are trampled upon. In order for women's land, property and succession rights to be protected and respected, there is need for the Law of Succession to be amended to ensure conformity with the constitutional and legislative framework; and current social trends.



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APPENDIX 1 MATRIX ON THE LAW OF SUCCESSION ACT CAP160 LAWS OF KENYA

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
<b>PART 1: PRELIMINARY</b>			
2 (1)	Application for the Act	In line with Article 27 (4) of the Constitution, we recommend that the Act applies to estates of all persons regardless of their sex, ethnic or social origin, religion or culture.	Amend to read Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons regardless of their sex, ethnic or social origin, religion and culture and to the administration of estates of those persons
2(2)	Application of the Act	We recommend deletion of this section as it promotes use of customary law which inhibits women from inheriting property.	Deletion
2 (3) and (4)	Application of the Act	We recommend deletion of this section as prohibits choice of the succession regime to be applied.	Deletion
NA	Application of the Act	We recommend insertion of provision allowing Application of Islamic Law	Insert after 2(1) 'A person who professes the Islamic faith may be governed by the Islamic law in all matters relating to succession'
2(4)		We recommend Deletion of this section as it excludes the applicability of the act to	Delete section



**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

Section	Marginal Note	Rationale for amendment	Proposed amendment
		Muslims whose laws are predominantly discriminative against women's right to property especially on matters succession.	
3 (1)	Interpretation	We recommend the inclusion of the following words be included in the interpretation to ensure that the Act confirms with other written laws	To insert
		"child"	"Child" means a person who has not attained the age of eighteen years.
		"cohabit"	"Cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.
		'intermeddling"	<p>"intermeddling" means</p> <ul style="list-style-type: none"> <li>a) taking possession of or disposing of or using the property of the deceased without the authority under this Act or any other applicable law;</li> <li>b) ejecting, by force or by coercion a surviving spouse or minor child from the matrimonial home</li> </ul>

**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

Section	Marginal Note	Rationale for amendment	Proposed amendment
			c) Any unlawful dealing with the deceased persons estate or interfering with the deceased
		"marriage"	'marriage' means a union recognized under the Marriage Act No. 4 of 2014
		"matrimonial home"	'matrimonial home' mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home; and included any other attached property
		"matrimonial property"	"matrimonial property" has the meaning assigned to it under the Matrimonial Property Act 2013
		'residue estate"	"residue estate" means the reminder of the net intestate estate after the matrimonial home, matrimonial property and personal effects have been distributed or otherwise transferred

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
		'spouse'	'spouse' means husband or wife
3	Interpretation	We recommend the deletion of household effect in the "personal and household effects" as they are regarded as matrimonial property.	Amend to read "personal property" means clothing and articles of personal use and adornment, furniture, appliances, pictures, ornaments, food, drink, utensils, simple agricultural equipment, livestock, and all other articles of household use or decoration normally to be associated with a matrimonial home, but does not include any matrimonial property or any other thing connected with the business or profession of the deceased
3 (2) and (3)	Interpretation	We recommend the deletion of provisions discriminating child(ren) born out of wedlock as the same is unconstitutional;	Amend to read "References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive), a child born in and out of wedlock, an adopted child"
3(5)	Interpretation	We recommend the deletion of this Section to	Delete



LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
		ensure it conforms to the recognized forms of marriages under the Marriage Act 2014. The deletion will ensure security of marriage.	
<b>PART III : PROVISION FOR DEPENDANTS</b>			
27	Discretion of court in making orders	We recommend that court should not have complete discretion but the discretion should be exercised in accordance with sound legal and factual, fairness and equity.	Amended to read "In making provision for a dependant the court shall have discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him or her by way of periodical payments or a lump sum, and to impose such conditions, except that the discretion shall fair and promote equality.
29(a)	Meaning of dependant	We recommend the deletion of the word "wife or wives and use gender neutral language. Further the deletion of "former wives" as dependants in cases of succession as this is contrary to the current laws governing marriages and matrimonial property rights.	Amended to read "For the purposes of this Part, "dependant" means— (a) Spouse or spouses and the children of the deceased whether or not maintained by the deceased immediately prior to his death;"
<b>PART V: INTESTACY</b>			
32	Excluded property	We recommend the deletion of this section as it is meant to supersede customary law except in cases	Amend Section 32 to read "The provisions of this Part shall not apply

**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

Section	Marginal Note	Rationale for amendment	Proposed amendment
		<p>of livestock, agricultural land, or crops located in exempted areas of land that have been specified in the Gazette, but in practice, it is applied much less often, especially in rural areas. This is because rural communities “remain unaware of statutory laws relating to property” and are instead “inclined to use customary laws in matters of inheritance, women especially widows who have no opportunity for redress in customary application, if applied then due to patriarchal nature of customary laws, women will be denied property.</p> <p>Further, the mentioned areas are mainly covered by Community Land Act No. 27 of 2016 as such the Act should guide the succession process.</p>	<p>to Land and any property registered under the Community Land Act No. 27 of 2016.</p>
33	Law applicable to excluded property	<p>We recommend that the provision on use of customary law for intestacy probate which discriminate women are unconstitutional. However, the Community Land Act is applicable in majority of the Districts listed thus inheritance of Land under the Act will be guided by the Act.</p>	<p>Amend to read                      “The law applicable for excluded property shall be Community Land Act No. 27 of 2016 or any other relevant law at the time being in force”</p>
35 (1)	Where intestate has left one surviving spouse and child or	<p>We recommend the deletion of the conditional clause after the section which terminates widow’s life interest upon remarriage. Widowers, on the</p>	<p>Amend to read                      “(1) Subject to the provisions of section <u>35(3)</u> and 40, where an intestate has left</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

Section	Marginal Note	Rationale for amendment	Proposed amendment
	children	<p>other hand, do not lose their life interest regardless of whether or not they remarry.</p> <p>The section does not also recognize the widows absolute right to the matrimonial home upon the death of the husband, therefore we further recommend the deletion of section that only provide personal items and life interest and introduce a section that allows for entitlement of matrimonial home and properties.</p>	<p>one surviving spouse and a child or children, the surviving spouse shall be entitled to—</p> <p>(a) entire matrimonial home and personal effects of the deceased;</p> <p>(b) share of matrimonial property as determined by the court</p> <p>(c) One third of the residue estate</p> <p>The court shall were applicable protect the deceased children interest in matrimonial homes</p>
35 (2)	Where intestate has left one surviving spouse and child or children	We recommend the deletion of life interest in 35 (2) and make provision on what share child/children should be allocated.	<p>Amend to read</p> <p>“2)-A surviving spouse shall, (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.</p> <p>(2) Subject to the provisions of subsection 35(3) and section 40 below, the surviving child or children shall be entitled to share equally in the remaining two-thirds of the</p>



LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
			residue estate; and for each minor child, his or her portion of the residue estate shall be held in trust by his or her parent, guardian, or caretaker until he or she reaches full age.
35(5)	Where intestate has left one surviving spouse and child or children	We recommend the deletion of remarriage of a widow as a way of cause for having her rights terminated and property devolve upon the children	Delete words "in the case of a widow, remarriage"
36(1)	Where intestate has left one surviving spouse but no child or children	We recommend that the surviving spouse get the entire net estate and the deletion of the conditional clause after the section which terminates widow's life interest upon remarriage in instances where there are no children involved. Widowers, on the other hand, do not lose their life interest regardless of whether or not they remarry and do have any children.	Amend to read "(1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled to the entire net intestate absolutely."
37	Powers of spouse during life interest	We propose the deletion of the section as we have made proposal earlier we have made recommendation for spouses to get actual interest	Delete
39	Where intestate has left no surviving spouse or children	We recommend the review of the section to ensure alignment to the constitutional provisions on equality and on discrimination. The section discriminates the rights of women as it allows a mother to inherit if father is not alive. It prefers	Amend to read Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of

**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

Section	Marginal Note	Rationale for amendment	Proposed amendment
		the entitlement of men over women in the devolution of the net estate.	priority (a) biological or adoptive parents: if none...."
40 (1)	Where intestate was polygamous	<p>We recommend a review of the section as it equates women’s status to children and does not have regard to the contribution by the wife in the acquisition of the property. It is also contrary to the Matrimonial Property Act No. 49 of 2013 which clearly states the entitlements of the subsequent wives to a polygamous marriage.</p> <p>We further recommend the introduction of a sub section to indicate that the wives have exclusive rights to their respective matrimonial homes</p>	<p>Amend to read “(1)Where intestate was polygamous under system of law permitting polygamy, and is survived by more than one wife, and had one or more children:</p> <p>(a) Where each wife had a separate matrimonial home:</p> <p>(i) Each wife shall be entitled to the matrimonial home and personal effects.</p> <p>(ii) Each wife shall be entitled to equal shares with the other wife or wives of one-third of the residue of the net intestate estate</p> <p>(iii) Each child of the deceased shall be entitled to an equal share with the other children of two-thirds of the residue of the net intestate estate.</p> <p>(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

Section	Marginal Note	Rationale for amendment	Proposed amendment
			<p>entitled to an equal share in the matrimonial home and in the personal and household effects.</p> <p>(i) Subject to paragraph (iii) of subsection (1) (b), the wives shall be entitled to one-third of the residue of the net intestate estate to be divided equally among them.</p> <p>(ii) Subject to paragraph (iii) of subsection (1) (b), the children shall be entitled to the remaining two-thirds of the residue net intestate estate, to be divided equally among them.</p> <p>(2) Where the intestate man was validly married to more than one woman under any system of law permitting polygamy, and is survived by more than one wife, but had no children:</p> <p>(a) Where each wife had a separate matrimonial home:</p> <p>(i) Each wife shall be entitled to the matrimonial home and personal and household effects.</p>



LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

Section	Marginal Note	Rationale for amendment	Proposed amendment
			<p>(ii) Subject to paragraph (iii) of subsection (2) (a), each wife shall be entitled to equal shares with the other wife or wives of the residue of the net intestate estate.</p> <p>(b) Where two or more wives shared a single matrimonial home, each wife residing in the matrimonial home shall be entitled to an equal share in the matrimonial home and in the personal and household effects and in the residue estate.</p> <p>(3) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another wife or more than one wife living, each wife living in a separate matrimonial home, and she is survived by her husband and had one or more children:</p> <p>(a) The husband shall be entitled to the matrimonial home and personal effects</p> <p>(b) The husband and each child, upon reaching full age, shall be entitled to the deceased's residue estate, in equal shares</p>

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

Section	Marginal Note	Rationale for amendment	Proposed amendment
			<p>among them.</p> <p>(4) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another wife or more than one wife living, and the deceased shared her home with one or more of her husband's other wives, and she is survived by her husband and had one or more children:</p> <p>(a) Each child, upon reaching full age, shall be entitled to co-ownership of the deceased's share of the matrimonial home and personal and household effects, in equal shares among them.</p> <p>(b) The husband and each child, upon reaching full age, shall be entitled to the residue of the net intestate estate in equal shares among them.</p> <p>(5) Where the deceased was a woman whose husband, at the time of her death, had validly married her and one or more other women under any system of law permitting polygamy and had another</p>

**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

<b>Section</b>	<b>Marginal Note</b>	<b>Rationale for amendment</b>	<b>Proposed amendment</b>
			wife or more than one wife living, and she is survived by her husband, but had no children, her husband shall be entitled to the matrimonial home and personal and household effects "  The court shall were applicable protect the deceased children interest in matrimonial homes
41	Property devolving upon child to be held in trust	We recommend the deletion of "or who may be female, marry under that age" and the ' or so marry" as it permits early child marriage contrary to the Children Act and Marriage Act	Delete the words 'or who may be female, marry under than age" and or 'so marry"
<b>PART VII- ADMINISTRATION OF ESTATES</b>			
44	Application of this Act	We propose the deletion of this section since the Act will apply to all property save for Community land	Delete
45	No intermeddling with property of deceased person	We propose the inclusion of other forms of intermeddling including interfering with the deceased beneficiaries rights. Intermeddling has been defined in Section 1	Amended to read  (1) As of the time of the deceased's death, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person or any use rights in the matrimonial home pursuant to section 32, unless he or she is authorized to do so by



LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA

Section	Marginal Note	Rationale for amendment	Proposed amendment
			<p>law or by a grant of representation and a subsequent confirmation of the grant under this Part.</p> <p>(2) Any person who contravenes the provisions of this section shall-</p> <p>(a) be guilty of criminal offence and liable to a fine not less than one hundred thousand shillings or to a term of imprisonment not less than five years and</p> <p>(b) be answerable to the rightful executor or administrator or owner by operation of law or holder of a use right by operation of law to the extent of the assets with which he or she has intermeddled after deducting any payments made in the due course of administration.</p> <p>(2) " A The surviving spouse and the child or children shall be entitled to protection against</p> <p>(a) Eviction from the matrimonial home;</p> <p>(b) Subjection to harmful cultural practice;</p> <p>(c) Physical and psychological abuse</p>

**LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA**

Section	Marginal Note	Rationale for amendment	Proposed amendment
			Any person found in contravention of these acts shall be guilty of an offence and liable to a fine not less than one hundred thousand shillings or a term of imprisonment not exceeding one year.
Section 46	Duties of officers in relation to protection etc. of deceased property	We recommend the inclusion other officers and need for the officers to inform the deceased beneficiaries on the need on the succession processes.	Amend to include a new section that reads (6) "Any assistant chief, chief, or administrative officer to whom a report is made under subsection (2) shall- (a) Ensure that all persons who appear to have a legitimate interest in the estate of the deceased receive all accurate and necessary information to redeem any legal claims they may have in the estate of the deceased. (b) Ensure accurate information on the rights dependants to inherit property and to remain in the matrimonial home; protection from harmful cultural practices; process of filing for probate and administrative cause
70	Powers of court	We propose the need for court to promote openness and access to justice	Amend to include section to read 2) a court shall, before making a grant of representation - (a) ensure that any surviving spouse

LAW OF SUCCESSION ACT, CAP 160 LAWS OF KENYA			
Section	Marginal Note	Rationale for amendment	Proposed amendment
			<p>appears before the court and is notified in person of his or her right to act as administrator; and</p> <p>(b) ensure form and information are easily accessible to assist dependants in the process of administering the estate with or without an advocate; and</p> <p>3 The Court shall embrace Alternative Disputes Resolutions in cases of contentious probate</p>
74	Error may be rectified by court	We recommend the inclusion of property inadvertently left out during the succession process. Many women in Kenya are not aware of their spouses estate and others discover their existence after completing the probate process	Amend to included inclusion of property inadvertently not listed.

1. Note, the Act should adopt a gender neutral language.





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When replying please quote

20<sup>th</sup> May 2021

Ref: No:.....NGEC/CS/NAS/005/VOL. I (41)

NATIONAL GENDER AND EQUALITY COMMISSION

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Dear Mr. Nyegeny,

**SUBMISSION OF MEMORANDUM ON THE LAW OF SUCCESSION  
(AMENDMENT) BILL (SENATE BILLS NO 15 OF 2021)**

Reference is made to your call for the submission of memoranda on the Law of Succession (Amendment) Bill, 2021.

The National Gender and Equality Commission (NGEC) is a Constitutional Commission with the mandate of promoting and ensuring gender equality, principles of equality and non-discrimination for all persons in Kenya, with a focus on Special Interest Groups (SIGs) who include women, children, Persons with Disabilities (PWDs), youth, older members of society and minority and marginalized groups.

Section 8 (b) of the National Gender and Equality Commission Act, No. 15 of 2011 mandates the Commission to, 'monitor, facilitate and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions';

In line with its mandate, the Commission presents to you its observations on the proposed amendments and its proposals in the enclosed Memorandum.

Yours sincerely,

Betty Sungura-Nyabuto, MBS  
**COMMISSION SECRETARY/CEO**  
Encl. (1)

*"Gender Equality and Non-Discrimination"*





**MEMORANDUM ON THE LAW OF SUCCESSION (AMENDMENT) BILL (SENATE BILLS NO 15 OF 2021)**

Submitted to: [Csenate@parliament.go.ke](mailto:Csenate@parliament.go.ke); cc: [senatejlahrc@gmail.com](mailto:senatejlahrc@gmail.com)

SERIAL NO.	SECTION 35 OF THE PRINCIPAL ACT	PROPOSED AMENDMENTS	PROPOSED AMENDED PROVISION
CLAUSE 6	<p>Where intestate has left one surviving spouse and child or children</p> <p>(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—</p> <p>(a) the personal and household effects of the deceased absolutely; and</p> <p>(b) a life interest in the whole residue of the net intestate estate:</p>	<p>The Bill proposes amendments to Section 35 of the Law of Succession Act as follows:-</p> <p><b>Section 35 of the principal Act, is amended—(a) in subsection(1) by — (i)inserting the words “subject to subsection (1A) at the beginning of paragraph (b); and(ii)deleting the proviso; and (b)by inserting the following new subsection immediately after subsection (1) —(1A) The interest of the surviving spouse under subsection (1)(b)shall</b></p>	<p>35. Where intestate has left one surviving spouse and child or children</p> <p>(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—</p> <p>(a) The personal and household effects of the deceased absolutely; and</p> <p>(b) <b>Subject to subsection (1A)</b>a life interest in the whole residue of the net intestate estate:</p> <p><b>(1A) The interest of the surviving spouse</b></p>



	<p>Provided that, if the surviving spouse is a widow that interest shall determine upon her re-marriage to any person.</p>	<p><b>determine upon re-marriage</b></p>	<p><b>under subsection (1)(b) shall determine upon re-marriage</b></p>
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**The Statement of the Objects and Reasons for the Bill**

It states that the principal object of this Bill is to amend the Law of Succession Act to provide for gender equity in succession matters.

The Bill in amending the Law of Succession Act seeks to ensure that the Act provides for gender equity with regards to succession matters. The Bill thus ensures that the widow and widower lose their life interest in the whole of the remainder of the net intestate estate once they re-marry.

**The Commission has some reservations on the proposed amendments as follows-;**

1. Section 29 of the Law of Succession Act does not include a widow who has re-married as part of the dependents nor a beneficiary. Can this Section be amended to include a proviso that recognizes a re- married widow in special circumstances?
2. Does the proposed amendment take into consideration any of the personal improvements on the net estate by the surviving spouse who has re- married?
3. If the children are still minors, who holds in their trust the net intestate estate. In this case is the surviving widow or widower not the closest kin in degrees of Consanguinity (blood relations). Section 39 (6) of the Substantive Act recognizes consanguinity up to the 6<sup>th</sup> degree in cases where the deceased died intestate and left no known spouse or children.
4. Some Customary laws recognize a woman married in a home as perpetually their wife and even if she goes away for any reason, she will always be welcome back because of the value she brought to the home who are the children. The relationship created throughout the life of the marriage is not extinguished with the re-marriage of the surviving spouse. This aspect of the customary law is accommodated and is therefore not repugnant to justice and morality in any way.
5. This amendment serves to deny the surviving spouse their right to get into another marriage because the consequences are loss of what they have been part of for qualitative and quantitative time.



6. What about in circumstances where the new marriage may not have anything substantive to offer, does that surviving spouse and especially the widow become homeless or a delinquent.
7. What about if the subsequent marriage dissolves can she be allowed to come back to her original home and/ or what about if her children were to bring her back as allowed by some cultures, will she be a squatter without any rights to anything.
8. What if she re- marries in the family, does she still lose that right.
9. If daughters who are married and children born out of wedlock are considered beneficiaries then why declare this surviving spouse persona non grata.

### **Proposal**

Having considered all the above scenarios among others, it is clear that the issue of a marriage of a surviving spouse is handled differently by various communities in their own way and it may need to be subjected to more conversations around it before arriving at a consensus that does not denote punishment to a surviving spouse who wants to re- marry but still retain a sense of belonging to their former family.

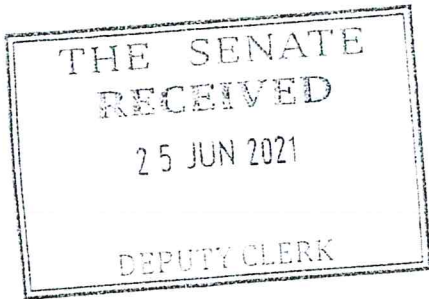
The spouse may not be entitled to the life interest while still married to another spouse but can they be entitled to part of the estate and in the event of returning be entitled to the life interest in cultures that accommodate such practice. A reverse of this culture is in instances where the husband had customarily divorced the wife but when he passes on, the family beseech the wife to return to bury the husband and manage the home because they still consider her, the lawful wife even if he had married others.

The Law of succession in Kenya has embraced various aspects of customary law including recognition of children born out of wedlock, polygamous marriages and even embrace of extended family and so this aspect can also find accommodation in the law where applicable.

And even as we consider this conversation we need to put in perspective the plight of widows visited on them by the family of the husband forcing them to get out of that home and re-marry for their own survival or peace.

The principal object of this Bill as stated is to amend the Law of Succession Act to provide for gender equity in succession matters. Equity means the quality of being fair and impartial and the question is whether the proposed amendments fulfill measures to this definition and who stands to benefit from such amendments.





MEMORANDUM TO THE SENATE ON THE LAW OF  
SUCCESSION (AMENDMENT) BILL 2020

JUNE 2021

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25/06/21*

SUBMITTED BY:

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## Introduction

The law that guides succession, protection and administration of a deceased person's estate in Kenya is The Law of Succession Act (Cap 160 Laws of Kenya) that came into effect on 1<sup>st</sup> July 1981, although it was passed by the parliament in 1972. The Law of Succession Act was brought in to conflate prior existing laws on succession into uniform entity applicable to all and sundry, race, ethnic, cultural and religious backgrounds regardless.<sup>1</sup>

The mechanism by which the property or estate devolves from the deceased, owner of the said property, to people left behind by him or her are provided for in the Law of succession. However, not every one left behind by the deceased qualifies to inherit the deceased property. That is why the law on succession strives hard to ensure that only the legitimate and rightful beneficiaries—dependents—inherit from the deceased.

Over the decades that the law of succession has been in operation, salient observations have been made. The question of gender equity shrieks loudest on “spouse” and “dependant” definitions. The dynamic society has made even the clamor for gender equity an exigency; an issue that should be addressed by emending the definitions to evince gender parity. To this end, The Law of Succession (Amendment) Bill, 2019 has been proposed. It aims at addressing the issue of gender equity and does away with ambiguity and absurdity of the definition of a spouse and dependant.

## The proposed Amendments

The proposed amendments in the Bill, amending some provisions of the Law of Succession Act are:

**Definition of spouse** - the Bill seeks to amend section 3 of the principal Act specifically on the definition of a spouse. It provides that; a spouse means a husband, or a wife or wives recognized under the Marriage Act.<sup>2</sup> What this therefore, means, is that one can only be recognized as spouse if the marriage is inconsonance with the dictates of the Marriage Act—the marriage must

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<sup>1</sup> Section 99 of the Act repeals all the then existing statutes on the law of succession, and these are listed in the 8th schedules. They are as follows: - (a) the Indian Succession Act of India 1865,(b) the Hindu Wills Act of India, 1870,(c) the Probate and Administration Act,1888,(d) the Hindu Succession Act,(e) the African Wills Act, 1961,(f) the Administration of Estates by Corporations Act,(g) the Commonwealth Probate Act,(h) the Colonial Probate Act, 1892.

<sup>2</sup> Marriage Act No 4 of 2014.



be recognized by the marriage Act. It is only through registration of a marriage that one can be recognized a wife or husband—a spouse.<sup>3</sup> Marriage Act only allows Civil, Christian, Islamic, Hindu and Customary marriages all guided by respective rules. According to the marriage act, Christian, Civil or Hindu marriages are monogamous whilst any marriage conducted under customary law or Islamic law is presumed to be polygamous or potentially polygamous.<sup>4</sup>

**Definition of a dependant** – the Bill seeks to amend section 29 of the principal Act, and provides for those who qualify as dependants by providing that;

*Dependant means, the spouse and children of the deceased whether or not maintained by the deceased immediately prior to his death; such of deceased's parents, stepparents, grandparents, grand children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers half-sisters as were being maintained by the deceased immediately prior to his death.*

The Bill introduces a stringent test for those who do not fall in the definition of a defendant by providing that such persons must prove that they were maintained by the deceased for a period of two years prior the deceased's death.<sup>5</sup> However, the Bill does not provide for whether the maintenance should be consistent or sporadic. This defeats the purposes for the amendment of the dependency clause. It will be a blank cheque that anyone can use to claim inheritance where they do not merit.

#### **Appraisal of the ramifications of the Amendments to the Law of Succession Act**

The Bill will bring radical change in terms of application and interpretation of section 3(5) of the Law of Succession, by the virtue of conforming definition of a spouse to that provided for in the Marriage Act. Prior to the insertion of Section 3 (5) by parliament at the operationalization of the Act, courts applied Section 37 of the Marriage Act CAP 150 (repealed) in determining succession disputes where a party lacked capacity to contract another marriage under any native law or custom. The decisions in *Re Ruenji H.C. Mis. Case No 136 of 1975* and *Re Ogolla (1978) KLR*, affirmed the provisions of the Marriage Act<sup>6</sup> that subsequent marriage in a monogamous marriage was null and void and subsequent wives were not entitled to inherit the deceased estate. The Court of Appeal clarified that Section 3(5) was intended to cater for subsequent women who found themselves in a situation where a man in a statutory union

<sup>3</sup> Part IX of the Marriage Act provides for registration of all types of marriages existing in Kenya: Christian marriages, civil marriages, customary marriage, Islamic marriage and marriages contracted abroad.

<sup>4</sup> Marriage Act, sec 6 (2) and (3).

<sup>5</sup> The Law of Succession (Amendment) Bill, 2019, sec 3(2).

<sup>6</sup> Marriage Act CAP 150 (repealed), sec 37

marries another woman under customary law<sup>7</sup>. However the High Court in *Jessica Atieno Onyony V Cecilia Angela Marwah & another* [2006] eKLR gave a different interpretation of Section 3(5) and the court ruled that the court is incapable of conferring upon the applicant the status of a wife as far as statute law is concerned since the deceased was in a monogamous marriage.

The Bill has defined “spouse” to conform to the Marriage Act, No 4 of 2014<sup>8</sup> taking us back to the initial intention of the Act. The concept of “capacity to marry” will undoubtedly be given life. The concept will stop being an abstract and become a reality. This is not the case currently, because the rules of interpretation of statutes are not adhered to. Thus, if the deceased was in a monogamous marriage under the Marriage Act and had not divorced, then any claim of marriage with the deceased will not succeed. With the current LSA in place, courts have made differing decisions touching on capacity to marry. This has led to precedence discordance despite the existence of the Marriage Act 2014.

In, *In Re Estate of: The Estate of Giovanni Gremmo (Deceased)* [2019]eKLR, the deceased married the respondent in a monogamous marriage but they later separated. It is during this period that the deceased met and started cohabiting with the applicant. The applicant was also married under monogamous marriage and at the time had not divorced her husband; neither had the deceased divorced his wife (respondent). However, the applicant divorced her husband after the deceased’s death. Further, the Applicant stated that she married the deceased under Maasai customary law. Applicant’s lawyer submitted that there was a marriage by presumption which the respondent’s lawyer rebutted stating that marriage cannot be presumed where parties lack *capacity to marry*; an argument that the court agreed with. Conforming definition of a ‘spouse’ in the law of succession act to that is given in the marriage Act, thus, will bring to an end the confusion currently being witnessed, by reinforcing the application of capacity to marry concept.

The definition will also aid the courts on succession issues where section 3(5)<sup>9</sup> of the Law of Succession is impugned. It will force the courts to interpret the section to exclude a spouse married by the deceased when the deceased was in a monogamous marriage system, from succession and only cater for children that resulted out of the “marriage.” However, if such

<sup>7</sup> Irene Njeri Macharia v Margaret Wairimu Njomo & another [1996] eKLR see also

<sup>8</sup> Section 2.

<sup>9</sup> Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act.



occurs—spouse married in a monogamous marriage—such a spouse can approach the court as a dependant under section 29(2).<sup>10</sup> Such a spouse, according to the Bill, will have to prove that she/he was maintained by the deceased two years prior to the deceased's death. This would mean that matters such as *In re Estate of Francis Waruingi Kangethe (Deceased) [2019] eKLR*, would be decided differently leaving the respondent out of the succession equation.

*In re Estate of Francis Waruingi Kangethe (supra)*, the deceased separated with his wife with whom they had 3 children. The deceased then started cohabiting with the respondent whom he sired kids with. They jointly held property and operated accounts until his demise. The son of the first wife protested against the confirmation of grant. The court delved into section 3(5) of the succession law to determine if the second wife was a wife for purposes of succession. The respondent was married by the deceased under Kikuyu customary law that allows polygamy. The court found that the first wife and the deceased never divorced therefore do not qualify as a former wife. The court also found that the respondent was a wife of the deceased for purposes of succession. The upshot is, they both inherited from the estate of the deceased.

If the case were to be decided as per the amendments proposed by the Bill, then only the first wife and the children plus the children from the other “marriage” would have inherited from the deceased estate. It would have never gone through section 40 of the Law of succession Act, that assumes the deceased died polygamous leaving surviving spouses and children, but instead assumed the position of section 35 that states that the deceased died leaving behind a spouse and children.

With the proposal of the Bill, defining a spouse as per the Marriage Act, the courts would not have to go the long process of interrogating section 3(5) of the succession Act where a spouse is dead, and the surviving spouse is proved to have had no subsisting marriage during their marriage with the deceased. According to marriage act<sup>11</sup>, marriage ceases to exist when a spouse dies. It will not therefore matter if the surviving spouse and the deceased were married in a system that allows polygamy or not. This also means that one qualifies to be a former spouse if the marriage has ceased to exist between them as provided for under the marriage act.

Lastly, the Bill by providing clarity on whom a dependant is does away with the former spouses' automatic rights to claim from a deceased estate. By this, opportunistic and malicious “spouses” with the aim of getting a share of estate upon the death of one spouse, by having children with

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<sup>10</sup> A person not named in this section shall not be a dependant for the purpose of this Act unless the person proves maintained by the deceased for a period of two years to the deceased's death.

<sup>11</sup> Section 16(a).

the deceased, will be weeded out. Furthermore, from the definition provided by the Bill, widowers are automatically dependents, thus, no evidence to prove the same is required. This is unlike the provision in the law of succession that provides that widowers have to prove dependency of being maintained by the wife immediately prior to the date of her death.<sup>12</sup> This is a clear path to achieving equality and equity among men and women—spouses—when it comes to succession.

However, there is need to conform section 35(1) of the Law of Succession Act to reflect gender equality. The section presents a stark inequality between widows and widowers. Widows are only allowed life interest in the whole residue of the net intestate estate which ceases upon re marriage. This is not the situation when it comes to widowers. In fact the law on succession is quiet on termination of life interest held by a widower.

By only allowing widows absolute and exclusive interest on the household and personal goods of the husband, and life interest over the property that terminates upon her re-marriage, is blatant show of inequality in marriage. The Constitution of Kenya 2010 under Article 45 (3) considers parties to a marriage equal at the time of marriage, during marriage and at the dissolution of marriage. This position is also iterated by Marriage Act in section 3(2).<sup>13</sup> However, the Law of Succession Act states otherwise under section 35(1). Judges on different occasions have tried to put this position into context. For instance, in matter of *ISB v MS & another; ZSM & 3 others (Interested Parties) [2021] eKLR* and *Tau Katungi v Margrethe Thorning Katungi & another [2014] eKLR*.

In the *ISB case (supra)*, Nyakundi J, states that the position stands because the whole issue of succession is about “a parent passing property on to his or her descendants but not to his or her contemporaries or ascendants.” He goes further to explain his position by contending that succession should not be within a generation but outside the generation. According to him, a property passing to a spouse does not qualify as a succession. For a succession to be properly so called, family wealth must pass from one generation to the next.

However, Musyoka J, has different approach towards the same as it is evident in the matter *Tau Katungi (supra)*. Musyoka J, held that section 35(1) of the Law of Succession Act was designed to protect the position of the surviving spouse from surviving children. He states that property bypassing the surviving spouse to surviving children portends a life of destitute to such a spouse.

<sup>12</sup> The Law of Succession Act, sec 29(c).

<sup>13</sup> Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.



Further, he provides that bypassing a surviving spouse is tantamount to rendering the concept of matrimonial property useless, as it will allow enjoyment of the property by the surviving children but the spouse surviving the deceased. However, he also holds that the ultimate destinations of net intestate where there are surviving children are the children.

Both Nyakundi J and Musyoka J in their judgments give reasons as to why a spouse, specifically a widow, should not have absolute interest on the net estate of the deceased just like in personal and household goods of the deceased. They both support termination of life interest of a widow upon remarriage to another person. This amounts to disingenuous disinheritance of widows in favor of their children. Nyakundi J., failed to consider the generation of spouses as a "joint generation" where upon the death of one, the surviving spouse takes over absolutely. Musyoka J., on the hand assumes that women do not contribute to generation and accumulation of matrimonial property and those women are weaklings who need protection from their children. It is evident from the judgments that the equality principle and right as envisioned in Article 27(1), Art 45(3) and section 3(2) of the Marriage Act, has been ignored in totality.

#### **Additional areas of focus**

For the Law of succession Act to acknowledge equality in marriage, the termination of life interest on nest intestate estate upon marriage must apply to both widows and widowers. Sections 35(b) and 36(c) of the LSA are gender discriminative in nature. They fail to recognize the aspect of matrimonial property and equality in marriage at the time of marriage, during marriage and at the dissolution of marriage, an aspect provided for by the constitution.<sup>14</sup> Kenya has ratified the Convention on Elimination of All Forms of Discrimination Against Women ( CEDAW) which prohibits discrimination against women and therefore it is prudent for the LSA to live to that.<sup>15</sup> Furthermore, Kenya has subscribed to Universal Declaration of Human Rights 1948, Covenant on Economic, Social and Cultural Rights and Covenant on Civil and Political Rights, all which loath discrimination. Moreover, a widower or a widow has the right to remarry or elect not to remarry<sup>16</sup>, it is therefore, discriminatory to terminate life interest of a widow for exercising her right to remarry.

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<sup>14</sup> Art 45(3) CoK 2010.

<sup>15</sup> Art I; For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

<sup>16</sup> Sec 15 of Marriage Act.

The position of discrimination against women was expressed in the case of *Douglas Njuguna Muigai v John Bosco Maina Kariuki & another* [2014] eKLR thus:

“Thankfully, under the constitution of Kenya 2010, all these rights are enshrined and they cannot be derogated against, they are *jus cogens*. The general rules of international law also form part of the law of Kenya... The yoke and burden of discrimination should not be worn by the female gender anymore, the constitution set it apart.”

Equality as provided for in the constitution<sup>17</sup> should be evident among widowers and widows. To give widows automatic rights in the deceased estate but require widowers to prove dependency on the deceased prior to her death<sup>18</sup> for the same rights to arise is a blatant show of inequality. Widowers need not to prove their dependency on the deceased prior to her death, to inherit from the deceased estate.

Parents of the deceased should be considered equal when distributing estate of a deceased child, where the deceased has left no surviving spouse or children. The LSA<sup>19</sup> discriminates against women by providing that in such a scenario the father of the deceased will be given the first priority and only if dead will the estate devolve to the mother. To exhibit equality, such an estate should devolve in equal shares to the parents.

The law on intestacy as provided for in part V of the LSA<sup>20</sup> contradicts the dictates of the constitution under Art 27(1) which provides for equal protection and benefit of the law. By excluding the law from applying to certain areas such West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok, and providing for customary laws applicable to the deceased community or tribe to take precedence, is a kin to throwing the women in those communities under the bus. It is no secret that customs in those communities favors men and frown upon women. LSA to that extent is thus discriminatory.

The definition of spouse if strictly pegged on that, which is provided for in the Marriage Act, will wipe away or dilute the concept of woman-to-woman marriage. Woman to woman marriage is a cultural practice that has been accepted by the courts. J.B Ojwang J (as he then was) in the *Estate of Cherotich Kimongonyi K-Monica Jesang Katan v Jackson Chepkwony & Another MSA Succession Cause N. 212/10* iterated the position of woman-to-woman

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<sup>17</sup> Art 27(1).

<sup>18</sup> Sec 29(c) LSA

<sup>19</sup> Sec 39(1)

<sup>20</sup> Sec (32) & (33)

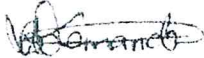
marriage existence under the Nandi customary law and held that the petitioner was a wife of the deceased within the meaning of section 29 of Law of Succession Act.

### **Conclusion**

The amendments proposed by the Bill are seeking to incorporate the principle of gender equality into the LSA as provided for under Article 27(1) of the constitution of Kenya. The Law on succession currently in use is perpetuating differential treatment among gender as elucidated above. The amendments are welcome for they breathe life of gender equality in the succession law and does away with ambiguity on issue spouse—automatic inclusion of former spouse as a dependent for inheritance purposes. It also reinforces adherence and respect to the rule of capacity to marry making it easy for the court to interpret and apply section 3(5) of the Law of Succession Act, by having fidelity to the Marriage Act. It is time for LSA to be realigned to conform to the constitution and marriage act. However, sections 3(5) and 29(2) of the Bill should be deleted for it defeats the purpose for the amendments.

### **Further consideration**

Whereas the Bill seeks to amend Section 3 of the LSA, there is need for complete overhaul of the Act to ensure it conforms to the provisions of the Constitution of Kenya 2010 and other enabling legislation passed post 2010.



For Anne Ireri

**Executive Director, FIDA-Kenya**





**MEMORANDUM**  
**13 May 2021**  
**by Anonymous Male Kenyan Citizen**

**On: Law of Succession (Amendment) Bill, 2021**

**The New Amendment**

3. Section 29 of the principal Act is amended by —  
(a) deleting paragraph (a) and substituting therefor the following new paragraph —  
(a) spouse or spouses and the *children* of the deceased whether or not maintained by the deceased prior to the deceased's death;

**"Children" as defined in the  
LAW OF SUCCESSION ACT CHAPTER 160**

(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.  
(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had been born to her or him in wedlock.

**"Birth Certificate"**

The "legal father" of the child has to be named on the birth certificate under the Laws of Kenya and in future should include ID No/Huduma No on the birth certificate.  
Therefore, this is another "child" that can be recognized by the Law of Succession Act.

**"DNA Problem"**

Woman of a "child" can suddenly claim that DNA is required to establish if a "child" is of the deceased male although the deceased did not accept this child.

The "child" can suddenly claim that DNA is required to establish if he/she is a "child" of the deceased male although the deceased did not accept this child.

The laws of Kenya do not distinguish between "legal father" and "biological father". The birth certificate is final and deals with "legal father". Parental responsibility agreement is also a key consideration.

Sudden DNA testing should not be allowed to establish the "biological father" and cause confusion and delays.

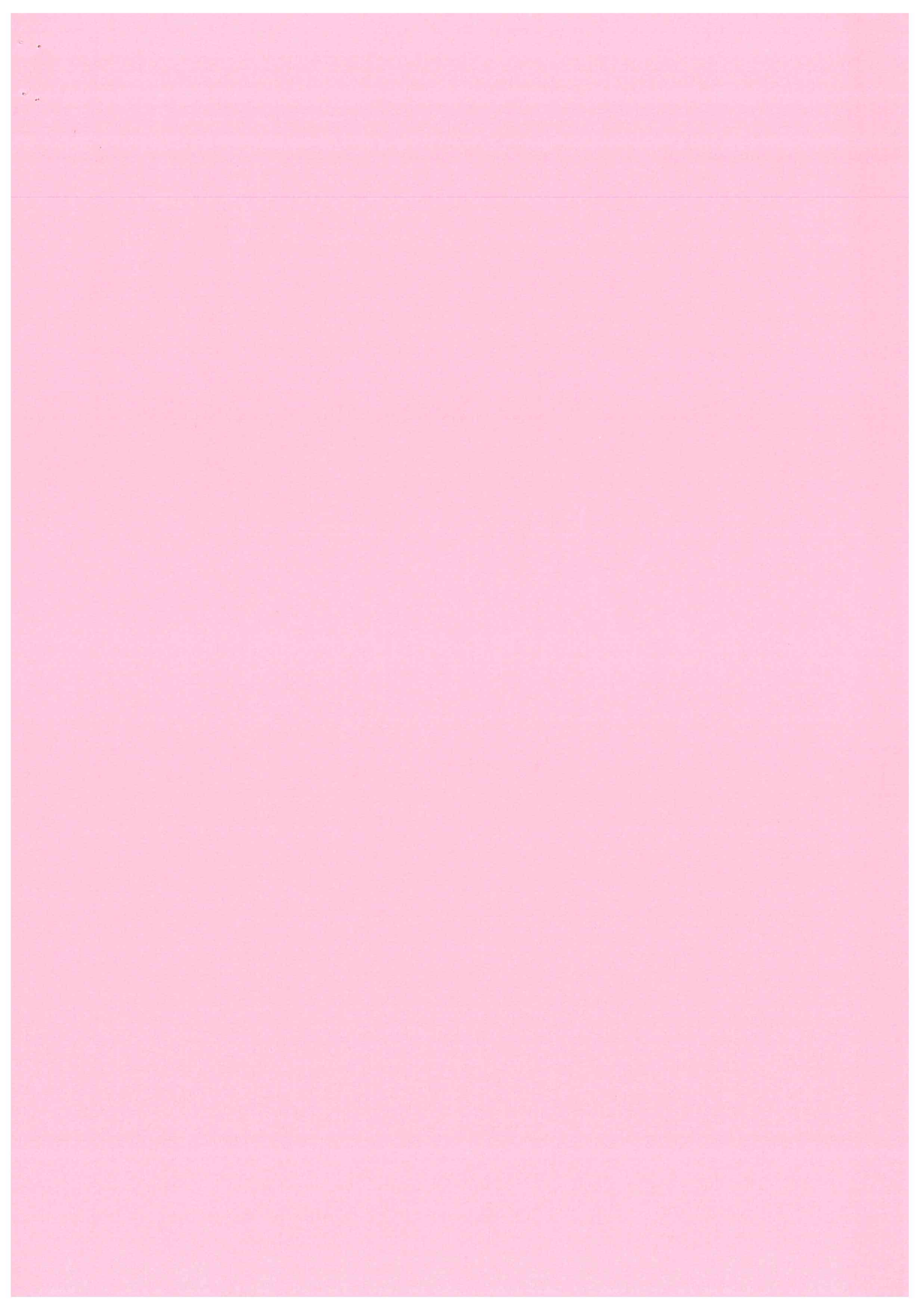
**Additional Suggested Amendment in the Law of Succession**

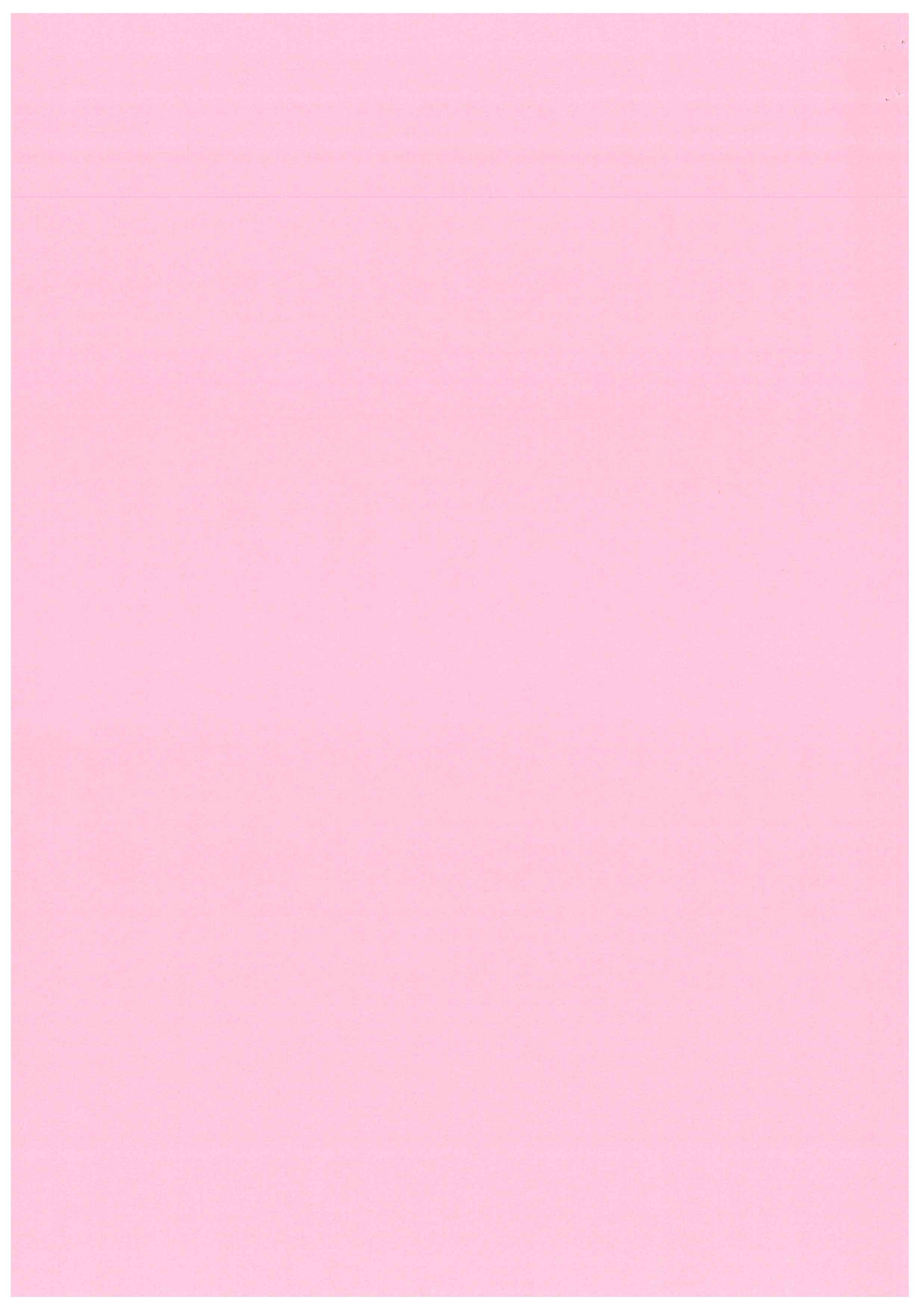
**3. Interpretations:**

(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, for whom he has entered into a parental responsibility agreement or is the legal father of the child as per the birth certificate.









THE SENATE



MATRIX

THE LAW OF SUCCESSION (AMENDMENT) BILL, 2021

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
2	Kenya Legal & Ethical Issues Network on HIV and Aids (KELIN)	<p>Insert the definition of the following words –</p> <p>“Cohabit” means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage;</p> <p>“ejecting” to forcefully send someone out of a house, land or place or residence;</p> <p>“marriage” means a union recognized under the Marriage Act No. 4 of 2014;</p> <p>“matrimonial property” has the meaning assigned to it under the Matrimonial Property Act 2013</p>	<p>To ensure that the Act conforms with other written laws</p> <p>The word “ejecting” is unknown in any other law thus there is need to define it. In the alternative, replace the word eject with the word “evict” within the meaning of Land Act 2012.</p>	<p>Cohabit has not been used in the Bill or in the Act being amended.</p>

CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
4	Federation of Women Lawyers – Kenya (FIDA-Kenya)	Delete section 32 of the Act.	The law is discriminatory by excluding the law from applying to certain areas such as West Pokot, Turkana, Marsabit, Samburu, Isiolo, Mandera, Wajir, Garissa, Tana River, Lamu, Kajiado and Narok, and providing for customary laws applicable to the deceased community or tribe to take precedence, is akin to throwing the women in those communities under the bus. Customs those communities favor men and frown upon women.	
6	National Gender and Equity Commission (NGEC)	<p>35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to —</p> <p>(a) the personal and household effects of the deceased absolutely; and</p> <p>(b) subject to subsection (1A) a life interest in the whole residue of the net intestate estate.</p> <p>(1A) The interest of the surviving spouse under subsection (1)(b) shall determine upon re-marriage.</p> <p><b>Despite the Proposal, when the NGEC appeared before the Committee, they indicated that they did not support the Bill and that there is need for</b></p>		



CLAUSE	STAKEHOLDER	PROPOSAL	REASONS	RESOLUTION
		broader conversation as regards succession law in the country with a view to address gender equity and fairness.		

**Other Submissions**

1. **Federation of Women Lawyers – Kenya (FIDA-Kenya)** – Supports the Bill for the reasons that the amendments will incorporate the principle of gender equality into the law of succession as provided for under Article 27(1) of the Constitution of Kenya, will remove ambiguity on issue spouse, reinforces adherence and respect to the rule of capacity to marry making it easy for the court to interpret and apply section 3(5) of the Law of Succession Act by having fidelity to the Marriage Act. It is time for LSA to be realigned to conform to the constitution and Marriage Act. However, sections 3(5) of the Bill should be deleted for it defeats the purpose for the amendments.

There is need for a complete overhaul of the Law of Succession Act to ensure it conforms to the provisions of the Constitution of Kenya 2010 and other enabling legislation passed post 2010.

2. **Anonymous Male Kenyan Citizen** whose submission is unintelligible but borders around the issues of ‘child and DNA’.





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24<sup>th</sup> September, 2021

The Clerk of the Senate

Parliament Buildings

NAIROBI

**RE: COMMITTEE STAGE AMENDMENTS TO THE LAW OF SUCCESSION  
AMENDMENT) BILL, SENATE BILLS NO. 15 OF 2021**

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**NOTICE** is given that Sen. Erick Okong’o Mogeni, the Chairperson to the Standing Committee on Justice, Legal Affairs and Human Rights, intends to move the following amendments to the Law of Succession (Amendment) Bill, Senate Bills No. 15 of 2021, at the Committee Stage —

**CLAUSE 2**

**THAT** the Bill be amended by deleting clause 2 and substituting therefor the following new clause —

Amendment of  
section 3 of Cap  
160.

**2.** Section 3 of the Law of Succession Act, hereinafter referred to as the “principal Act”, is amended —

- (a) in subsection (1) by inserting the following new definitions in their proper alphabetical sequence —

“child” includes a child who is conceived but not yet born on the date of death of the deceased provided that the child is subsequently born alive, and an adopted child.

“intermeddling” means —

- (a) taking possession of, disposing off, charging, receiving, distributing, leasing or using property of a deceased without authority under this Act or any other applicable law;
- (b) ejecting a surviving spouse or child from the matrimonial home; or
- (c) any unlawful dealing with a deceased person’s estate.

“matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property;

- (b) by deleting subsection (2); and
- (c) by deleting subsection (3).

**CLAUSE 3**

**THAT** the Bill be amended by deleting clause 3 and substituting therefor the following new clause –

Amendment of section 29 of Cap 160.

**3.** Section 29 of the principal Act is amended by–

(a) deleting paragraph (a) and substituting therefor the following new paragraph –

(a) the wife or wives, or the husband, and the children of the deceased whether or not maintained by the deceased immediately prior to the deceased’s death;

(b) deleting paragraph (c).

**CLAUSE 4**

**THAT** the Bill be amended by deleting clause 4 and substituting therefor the following new clause –

Repeal of section 32 of Cap 160.

**4.** The principal Act is amended by repealing section 32.

**CLAUSE 5**

**THAT** the Bill be amended by deleting clause 5 and substituting therefor the following new clause –

Repeal of section 33 of Cap 160.

**5.** The principal Act is amended by repealing section 33.

**CLAUSE 6**

**THAT** clause 6 of the Bill be amended –

(a) by deleting paragraph (b) and substituting therefor the following new paragraph –

(b) by inserting the following new subsections immediately after subsection (1)

(1A) The interest of the surviving spouse under subsection (1)(b) shall determine upon remarriage.

(1B) Notwithstanding subsection (1), -

(a) where the surviving child is not a child of the surviving spouse –

- (i) the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely and a life interest in one-half of the whole residue of the net intestate estate; and
- (ii) the surviving child shall be entitled to one-half of the whole residue of the net intestate estate which shall be held in accordance with section 41, and if there be more than one child they shall share equally;

(b) where the surviving children include a child who is not a child of the surviving spouse –

- (i) the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely;
- (ii) the net intestate estate shall, in the first instance, be divided equally amongst the surviving spouse and all the surviving children;
- (iii) the surviving spouse shall have a life interest in his or her share and that of his or her children under subsection (1B)(b)(ii); and
- (iv) the share of the surviving child under subsection (1B)(b)(ii) shall be held in accordance with section 41, and if there be more than one child they shall share equally.

(b) by inserting the following new paragraph immediately after paragraph (b) –

(c) by deleting subsection (5) and substituting therefor the following new subsection -

(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall, on the death or re-marriage of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

## **CLAUSE 8**

**THAT** clause 8 of the Bill be amended by deleting paragraph (a) and substituting therefor the following new paragraph –

(a) by deleting paragraph (a) and substituting therefor the following new paragraph—

(a) father and mother in equal share; or, if either is dead;

## CLAUSE 9

THAT the Bill be amended by deleting clause 9.

## INSERTION OF NEW CLAUSE 8A

THAT the Bill be amended by inserting the following new clause immediately after clause 8 -

Amendment of section 40 of Cap 160. **8A.** Section 40 of the principal Act be amended by inserting the following new subsection immediately after subsection (2) -

(3) Notwithstanding subsection (1), where any of the surviving children is not a child of the surviving spouse, the child shall –

(a) be considered a house in determining the share of dependants in the net intestate estate under subsection (1); and

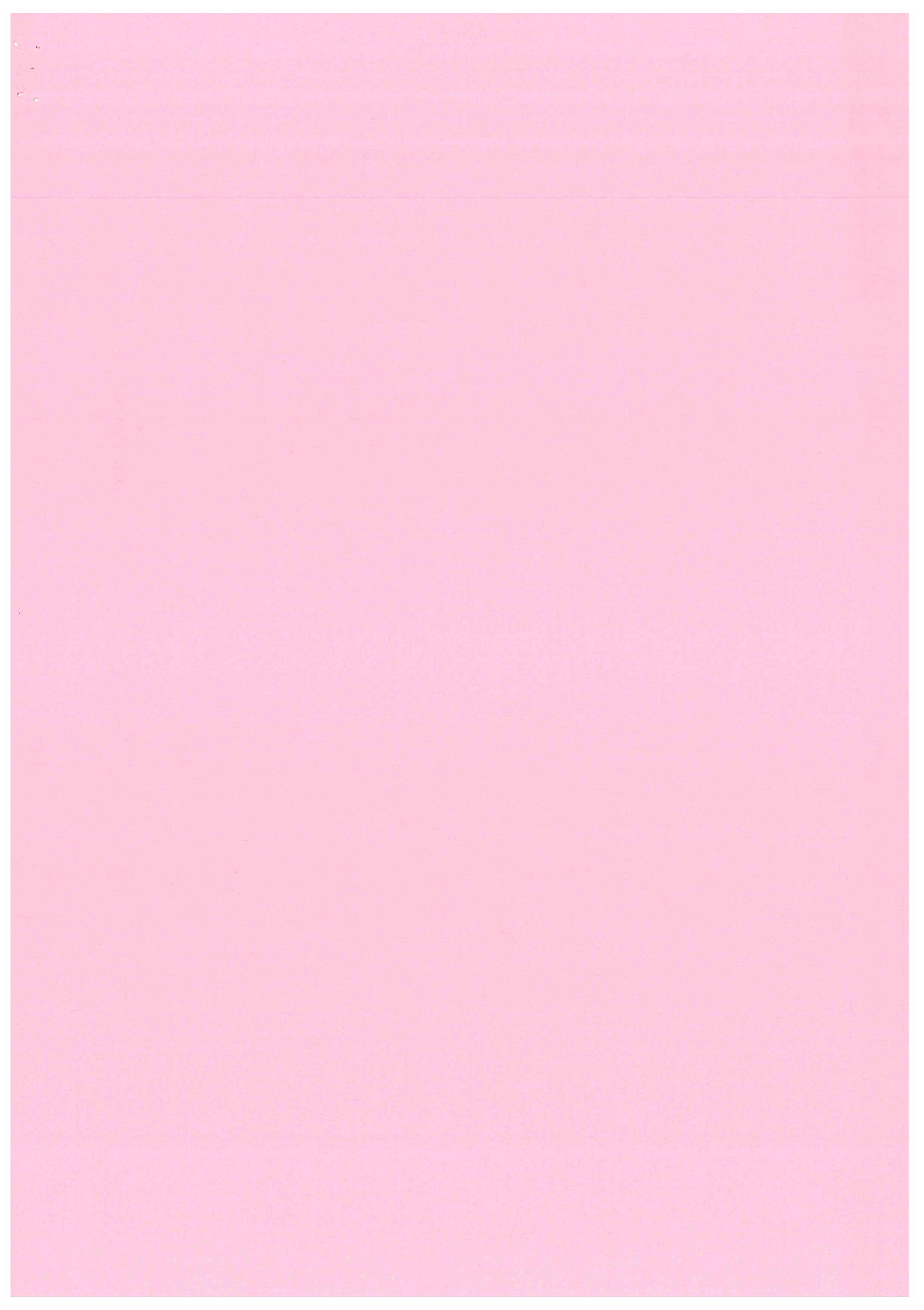
(b) the share of such child shall be held in accordance with section 41, and if there be more than one child they shall share equally.

Dated: 5<sup>th</sup> October, 2021.



.....  
Sen. Erick Okong'o Mogeni,  
Chairperson,  
Standing Committee on Justice, Legal Affairs and Human Rights.







**STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS**

**STAKEHOLDER VIEWS ON THE LAW OF SUCCESSION (AMENDMENT) BILL (SENATE BILLS NO. 1 OF 2020)**

<b>CLAUSE</b>	<b>STAKEHOLDER</b>	<b>PROPOSED AMENDMENT AND RATIONALE</b>	<b>COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION</b>
1.	<p><b>General</b></p> <p>The Kenya National Commission on Human Rights; the National Gender &amp; Equality Commission, the Kenya Law Reform Commission and Mr. Samson K. Ngeru, Advocate.</p>	<p>Support of the Bill for the reasons that –</p> <ul style="list-style-type: none"> <li>i. it seeks to infuse gender equity with regards to succession matters. This is in line with the Constitution, the regional and international human rights frameworks as well as the global Sustainable Development Goals and Africa’s Agenda 2063;</li> <li>ii. is in line with the various recommendations of regional and international treaty bodies; and</li> <li>iii. it aims to bring equality between men and women in matters inheritance.</li> </ul> <p>Amend the Memorandum of Objects and Reasons of the Bill to include a provision stating that the Bill seeks the elimination of all forms of discrimination.</p>	
2.	<p><b>4</b></p> <p>The Kenya Law Reform Commission</p>	<p>1) Amend the provision to delete paragraph (a) of the proposed new section 32 of the Law of Succession Act.</p> <p>2) Amend the provision to delete paragraph (b)</p>	

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION
		<p>of the proposed new section 32 of the Law of Succession Act, and to that extent delete all versions of section 32 of the Act in their entirety together with the proposed new Tenth Schedule.</p> <p><b>Rationale</b></p> <p>1) The intention of the provision is not clear. Further, the mischief being addressed by the provision does not exist as community land is owned by the community and not an individual and where the same is not registered it is held in trust by the respective county governments. In the circumstances, community land will never fall under the law of succession as envisaged by the provision.</p> <p>2) The provision will discriminate against women, especially in the areas specified under the proposed new Tenth Schedule. The areas have customary laws and practices which discriminate against women in matters inheritance. The same are therefore unconstitutional.</p>	
3.	The Kenya Law Reform Commission	<p>Amend the clause to delete section 33 of the Law of Succession Act in its entirety.</p> <p>Similar to the rational for the deletion of section 32 of the Act, this provision discriminates against</p>	



	CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION
			<p>women, especially in the areas specified under the proposed new Tenth Schedule. The areas have customary laws and practices which discriminate against women in matters inheritance. The same are therefore unconstitutional.</p>	
4.	<b>Additional Amendments</b>	The Kenya National Commission on Human Rights	<p>Amend section 3(2) and (3) of the Law of Succession Act to ensure that children born out of wedlock are not subjected to a different criterion and further ensure that recognition by their father is not discretionary.</p> <p><b>Rationale</b></p> <p>1) The provisions discriminate against children born out of wedlock contrary to Articles 27 and 53 of the Constitution. The provisions are also against the paramount principle of best interests of the child as encapsulated in national, regional and international human rights instruments.</p> <p>2) The provisions were declared unconstitutional for being inconsistent with Article 53(1)(e) of the Constitution. This was in the case of <i>NSA &amp; another v Cabinet Secretary for, Ministry of Interior and Coordination of National Government &amp; another [2019] eKLR</i> delivered by the High Court at Kakamega on</p>	<p><b>NOTES</b></p> <p>Section 3(2) &amp; (3) of the Law of Succession Act states—</p> <p>(2) References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.</p> <p>(3) A child born to a female person out of wedlock, and a child as defined by subsection (2) as the child of a male person, shall have relationship to other persons through her or him as though the child had</p>

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION
		<p>7<sup>th</sup> February, 2019. The court also directed the Attorney General to amend the provisions to amend them with the Constitution within ninety days from the date of the judgement. These amendments are yet to be effected.</p> <p>Amend section 5 of the Law of Succession Act to include a proviso that allows for a “supporter” to facilitate the making of wills by persons with mental illness rather than disenfranchising them of this right altogether.</p> <p><b>Rationale</b></p> <ol style="list-style-type: none"> <li>1) The provision effectively disqualifies persons with mental illness from writing wills and thus strips them of the legal capacity to transact.</li> <li>2) This is discrimination contrary to Article 27 of the Constitution which prohibits discrimination on the basis of disability.</li> <li>3) This is also contrary to the Convention on the Rights of Persons with Disabilities which Kenya ratified in 2008. Under the Convention, Kenya bound itself to ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life and to provide access by persons with disabilities to the support they may require in exercising their legal capacity (Article 12).</li> </ol>	<p>been born to her or him in wedlock.</p> <p>Section 5 provides as follows –</p> <p><b>5. Persons capable of making wills and freedom of testation</b></p> <ol style="list-style-type: none"> <li>(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.</li> <li>(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person.</li> <li>(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.</li> </ol>



	CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION
5.		Mr. Samson K. Ngeru, Advocate.	<p>Amend section 40(1) or 38 of the Law of Succession Act to make provision for a scenario where a surviving spouse is not the biological parent of all surviving children.</p> <p><b>Rationale</b></p> <p>According to section 40(2) of the Law of Succession Act, as read together with section 35(1)(b) of the Act, a child whose parent is not a spouse of a deceased person may never benefit from the estate of the deceased person as the net estate would be controlled by a surviving spouse(s) for their lifetime(s).</p> <p>A surviving spouse may, in utilising the life interest of the net estate of a deceased person, ignore the children of the deceased from other relationships. This will negatively affect some children of the deceased as they will have to wait for the death (unfortunately) of a surviving wife for them to benefit from the estate of a deceased person, if any of the estate will have been left.</p>	<p>(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.</p>
			<p>Section 40 of the Law of Succession Act states—</p> <p><b>40. Where intestate was polygamous</b></p> <p>(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.</p> <p>(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.</p>	

CLAUSE	STAKEHOLDER	PROPOSED AMENDMENT AND RATIONALE	COMMITTEE OBSERVATIONS/COMMENTS AND DETERMINATION
			<p>Section 35(1) of the Law of Succession Act states—</p> <p>(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to—</p> <p>(a) the personal and household effects of the deceased absolutely; and</p> <p>(b) a life interest in the whole residue of the net intestate estate:</p> <p>Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.</p> <p><b>53. Children</b></p> <p>(1) Every child has the right—</p> <p>(a) ...;</p> <p>(e) to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not; ...</p>



**Stakeholders**

1. The Kenya National Commission on Human Rights
2. The National Gender and Equality Commission
3. The Kenya Law Reform Commission
4. Mr. Samson K. Ngeru, Advocate





